Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF MARYLAND,
Petitioner,

v.

LABARON STANBERRY,
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
MARY ELLEN BARBERA
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6422

Counsel for Petitioner

**Counsel of Record*

13 pp

QUESTIONS PRESENTED

As part of a routine drug interdiction investigation, plain clothes police officers boarded a Greyhound bus at an interstate rest stop. After being told by the driver, who had mistakenly miscounted, that all of the passengers had reboarded the bus, the officers asked the passengers to identify their baggage. One suit bag was not claimed and, after asking all of the passengers then present if anyone owned the bag and receiving no response, the officers opened the bag and found cocaine and heroin. A few minutes later, a late returning passenger, Respondent Stanberry, attempted to reboard and told one of the officers that the bag was his. The state court reversed the controlled dangerous substance convictions, ruling that the search violated the Fourth Amendment and that the good faith exception to the exclusionary rule did not apply.

The questions presented are:

1. Whether the search of Stanberry's suit bag was reasonable under the Fourth Amendment because the officers relied on objective facts indicating that the baggage was abandoned.

2. Whether the admission of the drugs found in the bag, even if seized in violation of the Fourth Amendment, was proper because the officers acted in good faith in searching the bag.

PARTIES TO THE PROCEEDING

The caption contains the names of all parties below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Stanberry v. State*, 343 Md. 720, 684 A.2d 823 (1996), reversing the judgment of the Court of Special Appeals of Maryland, is reproduced in Appendix A. (App. 1a-25a).

The reported opinion of the Court of Special Appeals of Maryland, *Stanberry v. State*, 105 Md. App. 200, 659 A.2d 333 (1995), affirming the judgment of the Circuit Court for Harford County, Maryland, is reproduced in Appendix B. (App. 26a-42a).

The unreported March 24, 1994 ruling of the Circuit Court for Harford County, Maryland, denying Stanberry's motion to suppress, is reproduced in Appendix C. (App. 43a-46a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing the judgment of the Court of Special Appeals of Maryland was filed on November 12, 1996. This petition is filed within ninety days of that judgment, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against

> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On August 16, 1993, three members of the Maryland State Police, as part of a practice of routine drug interdiction, were monitoring Greyhound buses that stopped at the Maryland House rest stop on Interstate I-95. (App. 2a). Respondent Stanberry was a passenger on one such bus, which pulled into the rest stop at approximately 8:55 p.m. for a twenty-minute stop while en route south from Newark, New Jersey.

After the passengers left the bus, the police officers approached the driver and arranged to board the bus for the interdiction procedure once all of the passengers had returned. (*Id.*). At 9:20 p.m., the bus driver counted the passengers and reported that all were aboard. (*Id.*). In fact, the driver had miscounted; one passenger, Stanberry, had not yet returned. (*Id.*).

Two of the officers boarded the bus, while the third remained outside. Neither of the officers on the bus was in uniform or displayed a weapon. (*Id.*). They identified themselves to the passengers and explained that they were performing an interdiction procedure, the purpose of which was to prevent the flow of drugs into Maryland. (*Id.*).

The officers went to opposite ends of the bus and began asking passengers to identify their baggage. (*Id.*). One officer found a black suit bag in the overhead rack that was not identified by any of the passengers seated nearby. (*Id.*). The officer continued questioning the passengers about other bags in his section of the bus, then returned to

the unclaimed suit bag. (*Id.*). Again the officer inquired of the nearby passengers if the bag belonged to them; again, no one claimed the bag. (App. 3a). Finally, the officer took the suit bag to the front of the bus, held the bag overhead, and asked all of the passengers if anyone owned the bag. (*Id.*). No one claimed ownership of the bag. (*Id.*).

The officer then removed the suit bag from the bus, opened it, and found a white shopping bag with four smaller bags inside. (*Id.*). One of the bags contained cocaine; the other three bags each contained about 100 baggies of heroin. (*Id.*). The police closed the suit bag and left it at the door of the bus. (*Id.*).

At this time, Stanberry returned to the bus. (*Id.*). The bus driver at first tried to stop Stanberry from boarding, but then realized that Stanberry was, in fact, a passenger. (*Id.*). Before Stanberry reboarded, the officer stationed outside the bus asked Stanberry if the suit bag belonged to him. (*Id.*). Stanberry initially responded that the bag was his, but immediately thereafter disclaimed ownership. (*Id.*). Stanberry ultimately acknowledged that he was transporting drugs to Richmond, Virginia in return for $300. (*Id.*). The police arrested Stanberry. (*Id.*).

Stanberry was indicted on charges of bringing a controlled dangerous substance into Maryland and related offenses. (*Id.*). He filed a motion to suppress both the drugs found in the suit bag and his statement, arguing that the police had searched his luggage in violation of the Fourth Amendment and that his statement was suppressible as the fruit of the illegal search. (App. 3a-4a).

At the hearing on the motion, Stanberry testified that he had not abandoned the bag when he went into the Maryland House and that he had intended to, and did, return to the bus to continue his trip. (App. 4a). The State argued that the search of the bag was authorized by the

Fourth Amendment because the officers reasonably believed the suit bag had been abandoned, and because their conduct was reasonable under the totality of the circumstances. (*Id.*).

The suppression court denied the motion. (*Id.*). The court found as a fact that Stanberry had not abandoned his bag, but concluded that, under the circumstances, the officers reasonably believed that he had and, thus, did not violate the Fourth Amendment when they searched the bag. (App. 4a-5a).

Following his conviction of transporting a controlled dangerous substance, Stanberry appealed to the Court of Special Appeals of Maryland, challenging the denial of his motion to suppress. (*Id.*). The state intermediate appellate court affirmed on the ground that the officers reasonably believed Stanberry's suit bag had been abandoned when they searched it, and the search was therefore lawful Fourth Amendment conduct. (App. 5a-6a).

The Court of Appeals of Maryland reversed. That court rejected the State's argument, which rested on the "apparent consent" concept recognized by this Court in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), that if police reasonably believe luggage is abandoned, then their search of it comports with the Fourth Amendment's reasonableness requirement. The Maryland court instead analyzed the issue by resort to this Court's decision of *Florida v. Bostick*, 501 U.S. 429 (1991). The court determined that the reasoning underlying *Bostick* "precludes the courts, or the police, from inferring abandonment from the owner's failure to assert ownership of luggage in response to police questioning during a drug interdiction." (App. 15a-16a). The court concluded that, "when police are conducting a drug interdiction, when the interdiction protocol is the sole basis for the citizen inquiry and reasonable suspicion or probable cause is otherwise lacking, police may not infer abandonment from

the owner's passive failure to claim property." (App. 17a-18a). The court held, therefore, that the troopers in this case could not reasonably have believed that Stanberry's bag was abandoned. (App. 18a-19a, 21a-22a). The court rejected the State's alternative basis for affirming the suppression court's ruling, i.e., that the police had acted in good faith and, as such, the exclusionary rule ought not apply to the fruits of their good faith-based conduct. As the Court of Appeals viewed it, "the police were clearly aware of the passengers' right to remain silent or to leave the bus during the interdiction," and, thus, could not have acted in good faith. (App. 22a).

REASONS FOR GRANTING THE WRIT

The Court of Appeals of Maryland ruled in this case that no police officer can *ever* reasonably infer that property has been abandoned by its owner from the failure of persons in proximity to the property to claim ownership of it. Assuming that the officers in this case had questioned all of the bus passengers about ownership of the unclaimed suit bag and had received no response, the court concluded that it was unreasonable for the police to have inferred abandonment of the bag from silence. The court also concluded that a police officer who acts on the basis of such an inference may never be deemed to have acted in good faith. Neither conclusion is correct under decisions of this Court in analogous cases. Moreover, given the conflict that prevails among the lower state and federal courts with respect to both aspects of the lower court's decision in this case, and given as well the frequency with which drug interdictions occur, this case is an appropriate vehicle for this Court to decide both of these important questions.

I.

THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S PRECEDENT.

In at least four respects, the decision of the Court of Appeals of Maryland in this case is fundamentally at odds with this Court's Fourth Amendment jurisprudence.

First, the state court ignored a basic Fourth Amendment tenet, recently reiterated in the Court's decisions in *Ohio v. Robinette*, 117 S. Ct. 417 (1996), and *Whren v. United States*, 116 S. Ct. 1769 (1996), that the reasonableness of police conduct is measured by an objective standard and the subjective intentions of the parties play no role in the analysis. Notwithstanding this settled law, the Court of Appeals assumed that Respondent Stanberry's subjective intention to retain a possessory interest in his luggage, unknown to the troopers at the time of the search, was relevant to whether the police acted reasonably in assuming from the facts and circumstances that *were* known to them that the container had been abandoned.

Second, and contrary to *Robinette* in yet another respect, the lower court fashioned a categorical rule, apparently subject to no exceptions, that police may never rely on the failure of persons to claim ownership of a nearby container as evidence that the container has been abandoned. This per se rule runs afoul of this Court's admonition in *Robinette* that the reasonableness inquiry is fact-specific, and that a "'litmus-paper test or single sentence or . . . paragraph . . . rule fails to account for the endless variations in the facts and circumstances implicating the Fourth Amendment.'" *Id.* at 421 (quoting

Florida v. Royer, 460 U.S. 490, 506 (1983)).[1]

Third, the Court of Appeals failed to recognize that "the potential intrusiveness of the officers' conduct must be judged from the viewpoint of an innocent person in [the] position" of the passengers who are subject to the officers' inquiry. *Florida v. Bostick*, 501 U.S. at 438. Rather than read *Bostick* as suggesting that the police are entitled to assume that, when every passenger on a bus fails to claim ownership of a suit bag, the bag is abandoned, the state court reads *Bostick* as suggesting the contrary: "[W]e believe that [*Bostick*] precludes the courts, or the police, from inferring abandonment from the owner's failure to assert ownership of luggage in response to police questioning during a drug interdiction." (App. 15a-16a). As evidenced by this statement, the Court of Appeals is of the view that police must always assume that they are dealing with guilty, not innocent, individuals and evaluate their conduct in light of that assumption. This cannot be the law.[2]

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[1] In *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996), this Court reversed the Ohio Supreme Court's bright-line rule that a lawfully seized individual must be advised that he is "free to go" before his consent to search will be deemed voluntary. Previously, in *Florida v. Bostick*, 501 U.S. 429, 439 (1991), the Court reversed the Florida Supreme Court's per se rule that questioning aboard a bus always constitutes a seizure. The Maryland court's bright line rule in this case suffers from the same flaws as did the per se rules at issue in *Robinette* and *Bostick*.

[2] Wrongly interpreting the facts here as evidencing refusal on the part of the passengers to cooperate, the court, citing *Bostick*, 501 U.S. at 437, concluded: "To construe a refusal to cooperate with the police conducting a drug interdiction as an indication that property is abandoned, thereby

Fourth, the lower court's opinion in this case fails to take into account the reasonableness analysis this Court employed in *Hill v. California*, 401 U.S. 797 (1971), *Maryland v. Garrison*, 480 U.S. 79 (1987), and, most apposite to the present case, *Illinois v. Rodriguez*, 497 U.S. 177 (1990). These cases recognize that the police may be factually wrong in their assessment of a situation, yet reasonable in acting upon that mistaken notion. Indeed, as this Court declared in *Rodriguez*, 497 U.S. at 185:

> It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government--whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement--is not that they always be correct, but that they always be reasonable.

Rodriguez dictates the analysis that should apply to the abandonment issue presented by this case. The question is not whether Stanberry abandoned his suit bag, but whether the state troopers reasonably believed that he did.

In short, the court below fundamentally misapplied *Bostick* and *Rodriguez*. It compounded its errors by failing to recognize that under *Robinette* and *Whren* the subjective intentions of Stanberry and the officers were irrelevant. This Court should grant review to correct these misapplications of its precedent and to apply *Rodriguez* in

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justifying a warrantless search or seizure, would contradict the holding of *Bostick*." (App. 16a).

the context of apparent abandonment.[3]

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[3] Although this Court has yet to rule on the issue, numerous lower courts have relied on *Rodriguez* to hold that, so long as the police are reasonable in their mistaken belief that property is abandoned, they act reasonably in searching it. *E.g.*, *United States v. Barlow*, 17 F.3d 85, 89 (5th Cir.), *cert. denied*, 115 S. Ct. 148 (1994) (not referring to *Rodriguez*, but looking to officer's reasonable belief as controlling the analysis: "[A] police officer who discovers an unlocked car left at the end of a public street with the key in the ignition could reasonable [sic] conclude that the car had been abandoned"); *United States v. Rem*, 984 F.2d 806, 810-11 (7th Cir.), *cert. denied*, 114 S. Ct. 300 (1993) (noting that because a defendant's "subjective 'intent' could be any hindsight excuse that fits the situation," the court "must instead examine the objective facts as the various agents encountered them," and finding defendant abandoned his luggage when he jumped from train leaving luggage aboard); *United States v. McDonald*, 855 F. Supp. 267, 269-70 (S.D. Ind. 1994) (stating that the focus of the abandonment inquiry "must be on what was objectively made known to the police during the time period directly preceding the search," and finding actual, as opposed to apparent, abandonment); *State v. Browning*, 433 S.E.2d 119, 120 (Ga. App. 1993) (framing abandonment issue as "whether under the totality of the circumstances, the investigating officer reasonably believed at the time of the search that the accused had relinquished his interest in the property to such an extent that he no longer had a reasonable expectation of privacy in it," and finding defendant had not abandoned her purse); *People v. Smith*, 561 N.E.2d 252, 260 (Ill. App. 1990) (believing the reasonableness rationale of *Rodriguez* "to be fully applicable to a determination of whether a defendant has abandoned premises from which evidence is taken," and stating: "We see no principled distinction between a *reasonable but erroneous* belief by the police that a third party had 'common authority' with the defendant over the premises in question, and a *reasonable but erroneous* belief by the police that a defendant had abandoned

II.

THE DECISION BELOW CONFLICTS WITH OTHER LOWER COURT DECISIONS ASSESSING THE EFFECT OF THE DEFENDANT'S DISCLAIMER OF OWNERSHIP OF THE PROPERTY ON THE QUESTION WHETHER, FOR THE FOURTH AMENDMENT, THE DEFENDANT ABANDONED THE PROPERTY.

Proceeding from the premise that the reasonableness of the officers' conduct in this case turned on the threshold question whether the police may infer abandonment of luggage from the property owner's silence in the face of police inquiry about ownership, the Court of Appeals of Maryland concluded that the police are never entitled to rely on such silence as an indicator of abandonment. The court was wrong, however, in viewing this case differently from any other case in which the police are confronted with a disclaimer of ownership on the part of the person the police have reason to believe may possess the property. In this case, for all the officers knew, that person was on the bus at the time of the interdiction procedure and, by express disclaimer or silence,[4]

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the premises in question"); *State v. Roberts*, 631 A.2d 835, 839 (Vt. 1993) (concluding, on the basis of *Rodriguez*, that the officers' reasonable belief that the premises had been abandoned made their entry lawful even had the premises not in fact been abandoned).

[4] The seizing officer's testimony on this point was, "Nobody claimed [the suit bag] as being theirs, after several announcements." (App. 19a-20a). Although the officer was not

manifested a lack of ownership.

The courts are in conflict over whether disclaimer of ownership, be it affirmative statement, silence, or other action, permits the police to infer abandonment. Most courts hold that a disclaimer of ownership in luggage permits the officers to infer abandonment. *E.g.*, *United States v. McDonald*, 100 F.3d 1320, 1329 (7th Cir. 1996) (defendant's affirmative disclaimer coupled with subsequent failure to claim ownership of bag constituted abandonment); *United States v. Hernandez*, 7 F.3d 944, 947 (10th Cir. 1993) (defendant abandoned luggage on overhead rack by sitting some distance away from it and repeatedly failing to acknowledge ownership); *United States v. Thompkins*, 998 F.2d 629, 632 (8th Cir. 1993) (defendant's disclaimer of ownership constituted abandonment); *United States v. Rem*, 984 F.2d 806, 810-12 (7th Cir. 1993) (passenger who left luggage on overhead rack, then suddenly deboarded train, abandoned bag); *United States v. Gonzales*, 979 F.2d 711, 714 (9th Cir. 1992) (bus passenger's denying that luggage next to him was his and saying he had no objection to police opening it constituted abandonment); *United States v. Jones*, 973 F.2d 928, 931 (D.C. Cir.), *vacated in part on rehearing*, 980 F.2d 746 (1992) (passenger's flight from bus and subsequent disclaimer of ownership of bag constituted abandonment); *United States v. Springer*, 946 F.2d 1012, 1017 (2d Cir. 1991) (affirmative disclaimer of ownership of bag constituted abandonment); *United States v. Ruiz*, 935 F.2d 982, 983-84 (8th Cir. 1991) (defendant's words and actions indicated abandonment); *State v.*

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asked to elaborate, it may fairly be assumed that he was not met in his several inquiries with silence, but instead, with a combination of affirmative disclaimers, nonverbal actions reflecting non-ownership, and silence, any one of which is tantamount to a denial of ownership.

Daniels, 576 So. 2d 819, 823-24 (Fla. App. 1991) (affirmative denial of ownership constituted abandonment); *People v. Wilcher*, 495 N.E.2d 1001, 1003 (Ill. App. 1986), *cert. denied*, 480 U.S. 948 (1987) (same); *People v. Hollman*, 562 N.Y.S.2d 494, 496 (App. Div.), *appeal denied*, 565 N.Y.S.2d 771 (N.Y. 1990) (same); *State v. Johnson*, 390 S.E.2d 707, 710-11 (N.C. App. 1990) (same).

In contrast to these cases, other courts, like the Maryland court in this case, decline to view the objective facts and circumstances indicating to the police that luggage has been abandoned by virtue of no person's claim of ownership in the bag. These courts believe it improper to draw such an inference, apparently by reference, albeit unspoken, to the notion that a person may not be compelled to incriminate himself. *See United States v. Sanders*, 719 F.2d 882, 886 (6th Cir. 1983); *State v. Joyner*, 669 P.2d 152, 153 (Haw. 1983); *State v. May*, 608 A.2d 772, 776 (Me. 1992); *Commonwealth v. Small*, 552 N.E.2d 599, 600-01 (Mass. App. 1990); *Commonwealth v. Holloway*, 384 S.E.2d 99, 104 (Va. App. 1989). Not only does this view lack support in this Court's Fourth Amendment jurisprudence, it runs directly contrary to the Court's statement in *Bostick* that the effect of police activity on persons they encounter is to be assessed from the perspective of the innocent citizen. 501 U.S. at 438.

The courts are thus in conflict not only on the question whether police act in accord with the Fourth Amendment when searching property based on a reasonable, but mistaken, belief that the property has been abandoned, but on the antecedent question whether the police may reasonably rely on silence as an indicator of abandonment. With this case, the Court can resolve the conflict and clarify proper procedure in this frequently occurring police practice.

III.

THE LOWER COURTS ARE DIVIDED ON THE ISSUE WHETHER THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE APPLIES TO WARRANTLESS POLICE ACTIVITY.

Thirteen years ago, this Court ruled that notwithstanding a Fourth Amendment violation, the exclusionary rule need not be applied when police officers act in an objectively reasonable manner, but rely on a warrant that is later determined to be invalid. *See United States v. Leon*, 468 U.S. 897 (1984). This is so because the exclusionary rule is "'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" *Id.* at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Thus,

> [w]here the officer's conduct is objectively reasonable . . . "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty."

Illinois v. Krull, 480 U.S. 340, 349 (1987) (quoting *Leon*, 468 U.S. at 920).

Since *Leon*, the Court has twice applied the good faith doctrine to warrantless police activity. In *Krull*, the Court had no difficulty applying the doctrine to evidence seized by police during a warrantless administrative search authorized by a statute that was later declared to be

unconstitutional and upon which the police reasonably relied in executing the search. Just two years ago, the Court applied the *Leon* rationale in holding that a police officer's objectively reasonable reliance on incorrect computer data did not require application of the exclusionary rule to the evidentiary fruits of such reliance. *Arizona v. Evans*, 115 S. Ct. 1185, 1194 (1995).

Even though this Court has applied *Leon* to instances where the police have relied on legislative and clerical action, the lower courts continue to be divided on the question whether the good faith doctrine should apply when police have acted without a warrant. Some federal and state courts have applied the doctrine in the context of warrantless searches.

The leading case on this side of the issue is *United States v. De Leon-Reyna*, 930 F.2d 396 (5th Cir. 1991) (en banc). In that case, an officer noticed a welding truck which lacked welding equipment and, among other suspicious facts, contained a stack of plywood often used for false compartments to smuggle drugs and persons who are not United States citizens. *Id.* at 398. The officer called in the truck's license plate number to check whether the vehicle was stolen. *Id.* Misunderstanding the number, the dispatcher radioed back that the plates had been issued for a Ford dump truck and not the Chevrolet welding truck. *Id.* After being stopped, the defendant consented to an inspection of the truck, which led to the discovery of over a half-ton of cocaine. *Id.* The Fifth Circuit concluded that because it was objectively reasonable for the officer to think that under all of the circumstances the vehicle was engaged in criminal activity, the good faith exception applied to allow into evidence the fruits of the warrantless search. *Id.* at 401-02.

At least three state courts have applied the good faith exception to warrantless searches. *See People v. Downing*, 40 Cal. Rptr. 2d 176, 183 (Cal. 1995), *cert.*

denied, 116 S. Ct. 929 (1996) (good faith rationale "applies to cases such as this where a recognized exception to a warrant is the basis for the search and seizure of the evidence sought to be suppressed"); *Emerson v. State*, 648 N.E.2d 705, 708 (Ind. App. 1995) (good faith exception applies to warrantless search if police reasonably believed they had authority to search premises); *State v. Pearson*, 366 S.E.2d 895, 900 (N.C. App.), *cert. denied*, 374 S.E.2d 597 (N.C. 1988) (upholding warrantless search of blood sample where officer relied in good faith on court's issuance of nontestimonial identification order).

Four federal circuits, however, have declined to extend *Leon* to searches conducted without benefit of a warrant. *See United States v. Scales*, 903 F.2d 765, 768 (10th Cir. 1990); *United States v. Curzi*, 867 F.2d 36, 44 (1st Cir. 1989); *United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988); *United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984), *cert. denied*, 471 U.S. 1061 (1985). Likewise, in addition to Maryland, some state courts have expressed the view that the good faith doctrine does not generally apply to warrantless police activity. *See, e.g., Morse v. State*, 604 So. 2d 496, 502 (Fla. App. 1992); *State v. Prestwich*, 733 P.2d 811, 814 (Idaho App. 1987); *Commonwealth v. Elliott*, 714 S.W.2d 494, 497 (Ky. App. 1986); *Tomlin v. State*, 869 P.2d 334, 340 (Okla. Crim. App. 1994).

With this case, the Court can resolve the conflict among the lower courts created by *Leon*, *Krull*, and *Evans*. The policy underpinnings of the exclusionary rule dictate the result advocated by the State, because the rule's application is unwarranted where, as here, it does not result in appreciable deterrence. *See Evans*, 115 S. Ct. at 1191. The officer who searched Stanberry's bag reasonably believed it had been abandoned; thus, application of the exclusionary rule in this case would not

further its purpose of deterring police misconduct. Just as this Court has refused to subject a police officer to civil rights liability for a violation of the Fourth Amendment unless it was apparent by reference to clearly established law, *see Anderson v. Creighton*, 483 U.S. 635, 640 (1987), evidence obtained in violation of the Fourth Amendment should not be excluded from the criminal defendant's trial unless the violation was apparent and no reasonable officer would have believed the conduct to be lawful.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
MARY ELLEN BARBERA
Assistant Attorneys General

Counsel for Petitioner

**Counsel of Record*

February 7, 1997

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APPENDIX A

Court of Appeals of Maryland.

No. 107, Sept. Term, 1995

LABARON STANBERRY

v.

STATE OF MARYLAND

November 12, 1996

Argued before MURPHY,* C.J., and ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL, and RAKER, JJ.

RAKER, Judge.

We granted Petitioner's request for a writ of certiorari to answer the following question:

> Did the lower court err in denying Petitioner's motion to suppress the contents of his suitcase which was left on a Greyhound bus during a twenty minute stop at the

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* Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the adoption of this opinion.

Maryland House and which was searched in Petitioner's absence after police officers held it up and asked the passengers on the bus whether it belonged to them and received no response?

I.

On August 16, 1993, the Maryland State Police were monitoring Greyhound buses at the Maryland House rest stop on Interstate I-95 as part of a routine drug interdiction investigation. At approximately 8:55 p.m., Petitioner's bus arrived at the rest stop from Newark, New Jersey for a twenty-minute rest stop. Two state troopers, who were in plain clothes and were not displaying weapons, contacted the bus driver and arranged to board the bus and conduct the interdiction procedure once all of the passengers reboarded.[1] At approximately 9:20 p.m., the bus driver counted the passengers and concluded, erroneously, that everyone had returned to the bus. Two of the troopers then boarded the bus, identified themselves, and informed the passengers that they were performing a "drug interdiction." The troopers stated that the purpose of the interdiction was to prevent the flow of drugs into the State, and they requested the cooperation of the passengers. A third trooper remained outside the bus throughout the interdiction.

The two troopers proceeded to opposite ends of the bus and began asking passengers to identify their baggage. In the overhead rack, Trooper Burnette located a black suit bag that was not claimed by any of the passengers seated near it. He continued questioning passengers, and after completing his section of the bus, Trooper Burnette

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[1] The troopers did not count the passengers as they disembarked at the rest stop.

returned to the black bag and again asked the nearby passengers if the bag belonged to any of them. No one claimed the bag. Finally, after all of the other baggage had been claimed, Trooper Burnette took the suit bag to the front of the bus, held the bag overhead, and asked all of the passengers if anyone owned the bag. No one claimed the bag.

The troopers removed the bag from the bus, opened it, and searched it. The contents included a white shopping bag which contained four smaller plastic bags. One of the smaller bags contained cocaine, and each of the other three bags contained approximately one hundred baggies of heroin. The troopers closed the suit bag, left it beside the bus door, and proceeded to question some of the passengers. The third trooper remained outside the bus to watch the bag.

Petitioner then returned to reboard the bus. The bus driver initially stopped Petitioner from reboarding, but then realized that he had miscounted the number of people on the bus before the interdiction began, and that Petitioner was a passenger. Before Petitioner reboarded, the trooper stationed outside the bus asked him if the black suit bag belonged to him. Petitioner initially claimed ownership of the bag, but immediately contradicted himself and stated that it did not belong to him. Petitioner then told the trooper that he was transporting the drugs to Richmond, Virginia in return for $300. The troopers arrested Petitioner.

Petitioner was indicted by the Grand Jury for Harford County with one count of bringing a controlled dangerous substance into the State, one count of possession of a controlled dangerous substance with the intent to distribute, and one count of possession of a controlled dangerous substance in violation of Maryland Code (1957, 1996 Repl.Vol.) Article 27, §§ 286(a)(1), 286A, and 287(a). Petitioner moved to suppress both the drugs taken

from his baggage and his statement to the police. He contended that the police search of his luggage violated his constitutional rights under the Fourth Amendment and that his subsequent statement to the police should be suppressed as "fruit of the poisonous tree" because it resulted from the unlawful search.

At the evidentiary hearing on the motion to suppress, the State contended that the search of Petitioner's bag was permissible because the troopers reasonably believed that the bag was abandoned. The State also maintained that the search was reasonable under the totality of the circumstances.

At the suppression hearing, Petitioner testified that he had not abandoned his bag. He maintained that he had merely left it on the bus for a few minutes while he used the facilities at the rest stop. He testified that he left his bag when he went into the Maryland House but that he did not intend to abandon the bag. Petitioner stated that he intended to and did return to the bus to continue his trip. Petitioner maintained that in order to determine whether property is abandoned for purposes of the Fourth Amendment, the court should consider the subjective intent of the property owner[2] and evaluate whether the owner relinquished any reasonable expectation of privacy in the property. Applying this standard, Petitioner claimed, the property was not abandoned. Petitioner also argued that the troopers' belief that the bag was abandoned was not reasonable.

The circuit court denied the motion to suppress,

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[2] We shall use the term "property owner" throughout this discussion to denote the person in possession of the property at the time of the search. As we shall discuss *infra*, however, the property law concept of "ownership" does not determine the extent of Fourth Amendment protection.

concluding that although Petitioner did not in fact abandon his suit bag, the troopers reasonably believed that the bag was abandoned. Petitioner then proceeded to trial before the court with an agreed statement of facts in response to the charge of transporting a controlled dangerous substance into the state.[3] The court found Petitioner guilty and sentenced him to fifteen years imprisonment with all but three years suspended followed by two years of supervised probation.

Petitioner noted a timely appeal to the Court of Special Appeals, presenting the single issue that the trial court erred in denying his motion to suppress. The Court of Special Appeals concluded that the troopers' belief that Petitioner's bag was abandoned was reasonable, and thus the search was lawful. The court stated:

> In the instant case, the bus driver indicated to the officers that all the passengers had reboarded the bus. It was not until then that the officers began the interdiction process. Upon finding the bag and prior to opening it, the officers repeatedly inquired as to which of the passengers it might belong. These inquiries went unanswered. In [the troopers'] objective opinion, because they believed all the passengers that might have claimed ownership of the bag were present on the bus, they believed the bag had been abandoned. The trial court did not clearly err in stating that, although actual abandonment had not occurred, the officers, based on their knowledge and experience, acted reasonably in presuming the bag had been abandoned, based generally and on their knowledge at the specific time of the search. Moreover, "[t]o suppress the evidence in the face of such subdued official conduct would render all

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[3] The State elected not to prosecute Petitioner on the remaining charges.

such interdiction programs suspect. . . ." *[U.S. v.] Flowers*, 912 F.2d [707] at 712 [(4th Cir.1990)].

On the facts presented by this case, the officers' reasonable and objective basis for concluding that the bag had been abandoned was "much more than a calculated guess and cannot be described as an effort to conduct a fishing expedition. . . . The extreme sanction of exclusion would be inappropriate. . . ." *[U.S. v.] Owens*, 848 F.2d [462] at 466 [(4th Cir. 1988)]. That is not to say, however, that searches of this type will not be invalidated. While close scrutiny of interdiction claims of "reasonableness" is required by the Fourth Amendment to guard against contrived situations, our independent examination of the facts here present leads us to conclude, as did the trial court, that the officers acted reasonably. There may be many interdiction situations in which the intrusion on Fourth Amendment protections will be unreasonable. This, however, is not such a case.

Stanberry v. State, 105 Md.App. 200, 214-15, 659 A.2d 333, 340-41 (1995). We granted Petitioner's request for a writ of certiorari.

II.

In this case, we must consider the constitutionality of a search for narcotics conducted on a bus during a "drug interdiction." This is a matter of first impression in Maryland. Drug interdictions have become a widely used tool in fighting the "war on drugs." As the Supreme Court explained in *Florida v. Bostick*, 501 U.S. 429, 431, 111 S.Ct. 2382, 2384, 115 L.Ed.2d 389 (1991):

Drug interdiction efforts have led to the use of police surveillance at airports, train stations, and bus depots. Law enforcement officers stationed at such locations routinely approach individuals, either randomly or

because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them potentially incriminating questions.

The police have developed varying methods of conducting drug interdictions. S. Guerra, *Domestic Drug Interdiction Operations: Finding the Balance*, 82 J.CRIM. L. 1109, 1127-28 (1992).[4]

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[4] Professor Guerra describes three basic methods of conducting drug interdictions:

> The typical method used in sweeping buses involves the officers' boarding the bus and questioning everyone, requesting consent to search from some. The agents usually proceed to the back of the bus and work their way forward. The agents identify themselves and sometimes explain that they are seeking the public's cooperation in their drug interdiction efforts. In some cases, officers request a passenger's consent to answer some questions, but in most cases, they simply proceed to pose questions. The officers ask the passenger's name and itinerary, and then request to see identification and bus tickets. Officers then often request consent to search the passenger's person or belongings. In some cases, officers advise a person that consent to search may be refused.
>
> Alternatively, officers may sweep a bus by asking passengers to identify their luggage on the overhead racks or beneath the seats. If a particular piece of luggage goes unclaimed, the officers will inquire of the person sitting closest to it, and then of all the passengers, to determine its owner. If no one claims possession of it and if all the passengers are on board, the officers will then proceed to search the "abandoned" luggage. They often discover evidence that one of the nearby passengers owns the piece of luggage and, presumably, whatever contraband may be found inside.
>
> In some other cases, officers board a bus and randomly

Numerous courts have considered the constitutionality of searches and seizures conducted during drug interdiction investigations. *See, e.g., Bostick*, 501 U.S. 429, 111 S.Ct. 2382; *United States v. Flowers*, 912 F.2d 707 (4th Cir.1990), *cert. denied*, 501 U.S. 1253, 111 S.Ct. 2895, 115 L.Ed.2d 1060 (1991); *United States v. Garcia*, 909 F.Supp. 334, (D.Md.1995). The Supreme Court addressed the constitutionality of a drug interdiction in *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389. In *Bostick*, the Court considered whether a defendant questioned by police in the course of a drug interdiction on a bus had been illegally seized in violation of the Fourth Amendment. *Id.* Rejecting the Florida Supreme Court's *per se* rule barring drug interdictions on buses, *see Bostick v. Florida*, 554 So.2d 1153 (Fla.1989), *rev'd*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), the United States Supreme Court reasoned that:

> [E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, ask to examine the individual's identification, and request consent to search his or her luggage—as long as the police do not convey a message that compliance with their requests is required.

Bostick, 501 U.S. at 434-35, 111 S.Ct. at 2386 (citations

> select a few passengers to interview and from whom to request identification and bus tickets. In one reported case, the officers admittedly boarded the bus and then selected suspicious people or people who were "unduly nervous," obviously based only on their appearance and demeanor, and investigated only those people. These interviews invariably culminate in a request to search either the person or the passenger's belongings. In these cases, too, passengers often disclaim ownership of their baggage.

Guerra, *supra*, at 1127-28.

omitted). Although the Court remanded the case for a determination of whether, on the particular facts of the case, Bostick was seized, the Court rejected the view of the Florida Supreme Court that any drug interdiction conducted on a bus resulted in an unconstitutional seizure of the passengers. *Id.* at 437, 439-40, 111 S.Ct. at 2387-88, 2389.

Although the Court concluded in *Bostick* that bus drug interdictions are not *per se* unconstitutional, the Court further explained that if the police indicate that compliance with their requests is required "by means of physical force or show of authority," then the encounter may amount to an unlawful seizure of the person. *Id.* at 434, 111 S.Ct. at 2386. Thus, the applicability and extent of Fourth Amendment protections depend on the specific procedures used by the police. *See, e.g., United States v. Fields*, 909 F.2d 470 (11th Cir.1990); *United States v. Tartaglia*, 864 F.2d 837 (D.C.Cir.1989); *United States v. Whitehead*, 849 F.2d 849 (4th Cir.), *cert. denied*, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).

In the instant case, the drug interdiction search led police to conclude that a piece of baggage was abandoned, resulting in a warrantless search of the bag containing narcotics. Petitioner acknowledges that abandoned property is not protected by the Fourth Amendment, but he maintains that the property at issue in this case, his black suit bag, was not abandoned. Petitioner contends that he did not intend to abandon his property, and furthermore, that he did nothing to manifest any intent to abandon his bag. Thus, he asserts that the warrantless search of his bag was impermissible. The State responds that even if the police mistakenly believe that property is abandoned, their search of the property does not violate the Fourth Amendment provided they reasonably believe the property is abandoned. In this case, the State maintains that

Petitioner's bag appeared to be abandoned, and therefore the search did not violate the Fourth Amendment. Finally, the State advocates extending the "good faith" doctrine of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to this warrantless search.

III.

> The Fourth Amendment provides that:
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST., amend. IV. The scope of the protection afforded by the Fourth Amendment is defined in terms of the individual's "legitimate expectation of privacy." *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979); *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967); *Owens v. State*, 322 Md. 616, 625, 589 A.2d 59, 63, *cert. denied*, 502 U.S. 973, 112 S.Ct. 452, 116 L.Ed.2d 470 (1991).

Fourth Amendment protection, however, does not extend to property that is abandoned. *Abel v. United States*, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960); *Morton v. State*, 284 Md. 526, 531, 397 A.2d 1385, 1388 (1979); *Everhart v. State*, 274 Md. 459, 483, 337 A.2d 100, 114 (1975). By abandoning property, the owner relinquishes the legitimate expectation of privacy that triggers Fourth Amendment protection. *Venner v. State*, 279 Md. 47, 59, 367 A.2d 949, 956, *cert. denied*, 431 U.S. 932, 97 S.Ct. 2638, 53 L.Ed.2d 248 (1977). We have previously articulated a two-part test to determine when Fourth Amendment protection applies:

> [F]irst . . . a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation [must] be one that society is prepared to recognize as 'reasonable.'

Venner, 279 Md. at 52, 367 A.2d at 952 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)); *see also California v. Greenwood*, 486 U.S. 35, 39, 108 S.Ct. 1625, 1628, 100 L.Ed.2d 30 (1988). We have also noted, in accord with a number of other courts and commentators, that the test for whether property is abandoned for purposes of the Fourth Amendment differs from the property law concept of abandonment.[5] *Owens*, 322 Md.

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[5] For example, in *Venner*, we quoted *United States v. Wilson*, 472 F.2d 901, 902 (9th Cir.1972), *cert. denied*, 414 U.S. 868, 94 S.Ct. 176, 38 L.Ed.2d 116 (1973), for the proposition that:

> "The proper test for abandonment is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned."

Venner, 279 Md. at 53, 367 A.2d at 952; *see also United States v. Barlow*, 17 F.3d 85, 88 (5th Cir.), *cert. denied*, __ U.S. __, 115 S.Ct. 148, 130 L.Ed.2d 88 (1994); *United States v. Lewis*, 921 F.2d 1294, 1302 (D.C.Cir.1990); *United States v. Oswald*, 783 F.2d 663, 666 (6th Cir.1986); 1 W. LAFAVE, SEARCH AND SEIZURE, § 2.6(b), at 464 (2d ed. 1987 & 1995 Supp.); C. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 827-28 (1994); Note, *From Katz to Greenwood: Abandonment Gets Recycled from the Trash Pile—Can Our Garbage Be Saved from the Court's Rummaging Hands?*, 41 CASE W. RES. L. REV. 581, 589-92 (1991). *Cf. Katz v. United States*, 389 U.S. 347, 352-53, 88 S.Ct. 507, 512, 19 L.Ed.2d 576 (1967) ("[A]t one time . . . [the Fourth] Amendment was thought to limit only searches and seizures of tangible property.

at 625, 589 A.2d at 63; *Venner*, 279 Md. at 53, 367 A.2d at 952.

Although the Fourth Amendment abandonment inquiry focuses on the property owner's actual expectation of privacy, a subjective question, courts must frequently rely on objective indications of the owner's intent. As Chief Judge Murphy wrote for this Court in *Morton v. State*, 284 Md. at 531, 397 A.2d at 1388-89:

> Whether property has been "abandoned is generally a question of fact based upon evidence of a combination of act and intent." Intention is a prime factor in considering whether there has been an abandonment; it is to be ascertained from what the actor said and did since intent, although subjective, is determined from objective facts at hand.

(citations omitted). *See also Duncan and Smith v. State*, 281 Md. 247, 262, 378 A.2d 1108, 1118 (1977); *Everhart v. State*, 274 Md. 459, 483, 337 A.2d 100, 114 (1975); *United States v. Rem*, 984 F.2d 806, 810 & n. 2 (7th Cir.), *cert. denied*, 510 U.S. 913, 114 S.Ct. 300, 126 L.Ed.2d 248 (1993).

We have analyzed a variety of objective factors to determine whether property is abandoned. Among other considerations, we have evaluated the location of the property and assessed whether the area is secured. *Owens*, 322 Md. at 630-31, 589 A.2d at 66; *see also United States v. Most*, 876 F.2d 191, 196-97 (D.C.Cir.1989); *United States v. Oswald*, 783 F.2d 663, 666-67 (6th Cir.1986). We have also assessed how long the property remained in

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But '[t]he premise that property interest control the right of the Government to search and seize has been discredited.'") (quoting *Warden v. Hayden*, 387 U.S. 294, 304, 87 S.Ct. 1642, 1648, 18 L.Ed.2d 782 (1967)) (alteration in original) (footnote omitted).

the location prior to the search and the condition of the property at the time of the search. *Morton*, 284 Md. at 534, 397 A.2d at 1390; *Duncan and Smith*, 281 Md. at 263-64, 378 A.2d at 1118-19. In addition, we have considered whether the owner requested a third party to watch or protect the property. *Owens*, 322 Md. at 630, 589 A.2d at 65-66. Finally, we have considered whether the owner disclaimed or failed to claim the property when questioned by police. *Faulkner v. State*, 317 Md. 441, 451, 564 A.2d 785, 789-90 (1989); *Morton*, 284 Md. at 534, 397 A.2d at 1390.[6]

Applying these general principles of Fourth Amendment jurisprudence to cases involving luggage, we note first that the Supreme Court has recognized that an individual possesses a legitimate expectation of privacy in the contents of his or her luggage. *United States v. Place*, 462

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[6] The police frequently rely on the owner's disclaimer of ownership to indicate abandonment. *See, e.g., United States v. Lewis*, 921 F.2d 1294, 1303 (D.C.Cir.1990); *United States v. Lee*, 916 F.2d 814, 818 (2d Cir.1990); *United States v. Tolbert*, 692 F.2d 1041, 1044-45 (6th Cir.1982), *cert. denied*, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983); *United States v. Garcia*, 909 F.Supp. 334, 339 (D.Md.1995). Disclaimers of ownership are particularly important in the drug interdiction context, because drug interdiction procedures frequently involve asking passengers to identify their baggage. *See Guerra, supra*, at 1128.

Like consent, however, a disclaimer of ownership must be voluntary to be effective. *See McMillian v. State*, 325 Md. 272, 284-85, 600 A.2d 430, 436 (1992). Therefore, a disclaimer of ownership does not support a finding of abandonment when the disclaimer results from illegal police conduct. *Duncan and Smith*, 281 Md. at 263, 378 A.2d at 1118; *United States v. Ward*, 961 F.2d 1526, 1535 (10th Cir.1992).

U.S. 696, 707, 103 S.Ct. 2637, 2644, 77 L.Ed.2d 110 (1983); *Arkansas v. Sanders*, 442 U.S. 753, 762, 99 S.Ct. 2586, 2592, 61 L.Ed.2d 235 (1979) ("[L]uggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy."). In addition, because the operative issue, for Fourth Amendment purposes, is whether the property owner relinquished any reasonable expectation of privacy in the property, briefly relinquishing control of the property, *e.g.*, by checking baggage, does not always amount to abandonment.[7] *See Morton*, 284 Md. at 533, 397 A.2d at 1389-90; *cf. Venner*, 279 Md. at 51, 367 A.2d at 952.

Moreover, courts have found that temporarily leaving luggage in a secured area does not indicate abandonment. *United States v. Lee*, 916 F.2d 814, 818 (2d Cir.1990); *see also Most*, 876 F.2d at 198-99 (leaving shopping bag with store clerk, as required by store policy, does not constitute abandonment). For example, the United States Court of Appeals for the Second Circuit stated that:

> When checked luggage is left for a short period in the custody of an airline, it is presumed that the luggage is stored in a secure area and is safeguarded against intrusion. Thus, the luggage owner's expectation of privacy remains undiminished, even though he fails to promptly retrieve his bag. However, this presumption

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[7] Professor LaFave also observes that:

> It should not be assumed . . . that in every instance in which a defendant relinquishes possession or control, albeit briefly, an abandonment for Fourth Amendment purposes has occurred. *The fundamental question is whether the relinquishment occurred under circumstances which indicate he retained no justified expectation of privacy in the object.*

1 LAFAVE, *supra*, § 2.6(b), at 467 (emphasis added).

> can certainly be overcome when other objective facts demonstrate the owner's intention to abandon his property.

Lee, 916 F.2d at 818 (citations omitted). Thus, "[f]ailure to retrieve a checked suitcase from a baggage claims area does not automatically constitute abandonment." *United States v. Rem*, 984 F.2d 806, 811 (7th Cir.1993); *see also United States v. Tolbert*, 692 F.2d 1041 (6th Cir.1982), *cert. denied*, 464 U.S. 933, 104 S.Ct. 337, 78 L.Ed.2d 306 (1983).

As Chief Judge Wald observed, writing for the United States Court of Appeals for the District of Columbia Circuit:

> [A]n individual need not shut himself off from the world in order to retain his fourth amendment rights.
>
> * * * * * *
>
> When an individual, by abandoning his property, leaves it within the reach of the public generally, there would be little point in requiring that the police alone be excluded. Such a rule would impede effective law enforcement while adding little to the individual's interest in privacy. It is quite another matter, however, to suggest that an individual forfeits his expectation of privacy simply by entrusting his possessions to one other person. . . . In a variety of circumstances, we are all forced to surrender our possessions temporarily to the custody of others. We leave our bags with clerks at stores, museums, and restaurants; we check our luggage when we travel by train or by air; we park our cars at commercial garages. The suggestion that police in these situations may conduct warrantless searches of our belongings finds no support in precedent or in logic.

Most, 876 F.2d at 198 (footnotes omitted) (citations omitted).

Although courts should generally consider all relevant facts in assessing whether property was abandoned, we

believe that the Supreme Court's decision in *Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991), as discussed above, precludes the courts, or the police, from inferring abandonment from the owner's failure to assert ownership of luggage in response to police questioning during a drug interdiction. An affirmative disclaimer of ownership is markedly different from passive failure to claim one's property. *United States v. Rush*, 890 F.2d 45, 48 (7th Cir.1989); *United States v. Hawkins*, 681 F.2d 1343, 1346-47 (11th Cir.1982); *United States v. Sanders*, 719 F.2d 882, 885-86 (6th Cir.1983); *State v. Joyner*, 66 Haw. 543, 669 P.2d 152, 153 (1983); *State v. May*, 608 A.2d 772, 776 (Me.1992) ("Although a number of courts have held that abandonment may arise out of an express disclaimer of ownership . . ., abandonment cannot be similarly inferred from mere silence in response to police questioning."); *cf. United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir.1992) (in assessing whether third party validly consented to search defendant's property, "[c]ourts consider . . . whether the consenter explicitly disclaimed ownership or whether the defendant was present but did not claim ownership").

Bostick requires that "a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." 501 U.S. at 436, 111 S.Ct. at 2387. The Supreme Court further explained: "We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." *Id.* at 437, 111 S.Ct. at 2387. To construe a refusal to cooperate with the police conducting a drug interdiction as an indication that property is abandoned, thereby justifying a warrantless search or seizure, would contradict the holding of *Bostick*.

In *Commonwealth v. Holloway*, 9 Va.App. 11, 384 S.E.2d 99 (1989), the Virginia Court of Appeals considered the issue of whether, in light of *Bostick*, failure

to assert ownership in response to police questioning may be interpreted to indicate abandonment. The court reasoned that:

> The defendant's failure to respond to the agent's inquiry concerning ownership of the luggage need not be interpreted as abandonment. Having been advised by the agent that he was investigating for illegal drugs on board the train, the defendant, whose assertion of ownership may have been incriminating, chose to remain silent in the face of police questioning. He had a right to remain silent. *Florida v. Royer*, 460 U.S. 491, 502, 103 S.Ct. 1319, 1326, 75 L.Ed.2d 229 (1983). The failure of other passengers in the vicinity to claim ownership is not evidence of the defendant's abandonment of ownership nor is it evidence that the true owner had abandoned the luggage. The luggage was in a proper place for storage, and the owner may not have chosen to answer or been available when the agent inquired of passengers in the vicinity.

Holloway, 384 S.E.2d at 104. The appellate court determined that the trial court was not clearly erroneous in concluding that the defendant's luggage was not abandoned. *Id.*

In sum, we conclude that in determining whether property is abandoned, the Fourth Amendment requires that we consider whether the owner has relinquished any reasonable expectation of privacy in the property. While the owner's intent to abandon the property may be relevant in determining whether the owner had a reasonable expectation of privacy, subjective intent alone is not dispositive. *See United States v. Thomas*, 864 F.2d 843, 846-47 & n. 5 (D.C.Cir.1989); *see also* 1 LAFAVE, *supra*, § 2.6, at 111 n. 48 (1995 Supp.). Intent to abandon must ordinarily be assessed based on external manifestations, such as the owner's words and actions. *Duncan and Smith*, 281 Md. at 264-66, 378 A.2d at 1119-20. An

owner's affirmative disclaimer of ownership, if voluntary, ordinarily constitutes abandonment. But when police are conducting a drug interdiction, when the interdiction protocol is the sole basis for the citizen inquiry and reasonable suspicion or probable cause is otherwise lacking, police may not infer abandonment from the owner's passive failure to claim property.

IV.

Applying the factors outlined above to the present case, we note at the outset that the police entered the bus without articulable suspicion or probable cause, and they subsequently searched Petitioner's luggage without a warrant. Under the circumstances of this case, we conclude that the objective manifestations of Petitioner's intent did not support the troopers' conclusion that Petitioner's bag was abandoned.

We first observe that Petitioner possessed a legitimate expectation of privacy in his baggage. In addition, although Petitioner may have reduced his expectation of privacy by placing his bag on the overhead luggage rack, Petitioner did not surrender his expectation of privacy merely by placing his bag where it was accessible to other passengers. Nor did Petitioner forego his expectation of privacy by leaving the bag on the bus when he disembarked at the rest stop. The area was to some extent secure, because no one could board the bus without the permission of the driver. Petitioner did not ask another passenger to watch the bag or otherwise give control of his property to anyone else. Petitioner merely left his bag on the bus for a brief period while he used the facilities at a scheduled rest stop.

Moreover, recognition of Petitioner's subjective expectation of privacy in his luggage is reasonable. *See Morton*, 284 Md. at 534, 397 A.2d at 1390. As the United

States Court of Appeals for the District of Columbia stated, "[t]he law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment." *United States v. Thomas*, 864 F.2d 843, 846 (D.C.Cir.1989)

Because we conclude that Petitioner possessed a reasonable expectation of privacy in his luggage, triggering Fourth Amendment protection, we must next consider whether the police could reasonably have concluded that Petitioner's bag was abandoned. As stated in Section III, we shall consider not only Petitioner's subjective intent, but also whether, under the circumstances of this case, the troopers could legitimately have inferred from objective indications that Petitioner's bag was abandoned.

The record indicates that the police concluded that the bag was abandoned because no one claimed it in response to their questioning. This is reflected by the following exchange during the State's direct examination of Trooper Burnette at the suppression hearing:

> [STATE'S ATTORNEY]: Now with regard to—and I am asking for your knowledge, your thought processes—what made you believe that the overhead suit bag was abandoned at the time that you describe that it was?
>
> [TROOPER]: Nobody claimed it as being theirs, after several announcements. And it's been my experience that when a bag is not claimed that there [are] . . . possibly illegal substances in the bag.

We conclude that, under the totality of the circumstances, the troopers should not have inferred abandonment from the passengers' silence. As we stated above, in accord with the Supreme Court mandate in *Florida v. Bostick*, in order for the drug interdiction search to meet constitutional requirements, a passenger must feel free to refuse to comply with police requests, to remain

silent in response to police questions, and to leave the bus if desired.[8]

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[8] The record reflects that the police were aware of the principles articulated in *Bostick* governing the administration of drug interdictions. For example, on cross-examination of Trooper Burnette, the following exchange occurred:

> [DEFENSE COUNSEL]: Trooper, [the State's Attorney] . . . asked you whether during the course of your interdiction where you are going down the aisle, are passengers restrained from leaving the bus . . . [a]nd I think you indicated they are not?
> [TROOPER]: That's correct.
> [DEFENSE COUNSEL]: I guess the purpose—is it fair to say that the purpose is to put the people at ease?
> [TROOPER]: Yes.
> [DEFENSE COUNSEL]: To make the whole episode as convenient as possible?
> [TROOPER]: Right. We try not to pressure anyone or show any authority. They know we are the police, but we don't wear uniforms. We try to make them as comfortable as possible. We don't want any indication or don't want anyone to think they are scared or coerced into cooperating with us.
> [DEFENSE COUNSEL]: And you say they frequently do smoke a cigarette or whatever—step off of the bus?
> [TROOPER]: Yes, they do.
> * * * * * *
> [DEFENSE COUNSEL]: As you are conducting your interdiction process, how did you keep track of passengers going on and off of the bus to have a cigarette?
> [TROOPER]: We don't really try to keep track of them. If one gets off we may observe them get off of the bus. We don't really keep track.
> * * * * * *
> [DEFENSE COUNSEL]: Now is it also possible that

In sum, under these circumstances, it was not reasonable to conclude that the luggage was abandoned. Hence, the Fourth Amendment applied to the drug interdiction search. As previously stated, subject to a few well-delineated exceptions, warrantless searches are *per se* unreasonable. *McMillian v. State*, 325 Md. 272, 281, 600 A.2d 430, 434 (1992); *Ricks v. State*, 322 Md. 183, 188, 586 A.2d 740, 743 (1991). In this case, the State failed to establish that any recognized exception to the warrant requirement applied.[9]

The State, relying on a theory of "apparent abandonment," argues by analogy to *Illinois v. Rodriguez*, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), that the search should be upheld because the troopers reasonably relied on objective facts indicating that the luggage was abandoned, although it was not in fact

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> one of them could be off of the bus smoking a cigarette or have returned to the Maryland House for some purpose when a bag is identified?
> [TROOPER]: Not in my experience. Usually once we have [passed] . . . an area—I never had one get off of the bus before they had acknowledged that was a bag they had.
> [DEFENSE COUNSEL]: But you said you wouldn't stop them?
> [TROOPER]: No, I wouldn't.

[9] Although Petitioner initially claimed ownership of the bag, then immediately disclaimed ownership of his bag, the disclaimer did not occur until after the troopers had searched his bag. Under these circumstances, this after-the-fact disclaimer may not be used as a *post hoc* justification for an otherwise unconstitutional search. *Robles v. State*, 510 N.E.2d 660, 663 (Ind.1987), *cert. denied*, 487 U.S. 1218, 108 S.Ct. 2872, 101 L.Ed.2d 907 (1988); *Franklin v. State*, 913 S.W.2d 234, 240 (Tex.Ct.App.1995).

abandoned. In *Rodriguez*, the police conducted a warrantless search of the defendant's apartment, relying on the defendant's girlfriend's apparent authority to consent to the search. *Id.* at 179-80, 110 S.Ct. at 2797. Although the police subsequently learned that the girlfriend lacked actual authority to consent, the Supreme Court held that if the police acted "reasonably" in light of the objective indications that the girlfriend possessed common authority over the premises, then the search was not unconstitutional. *Id.* at 182-89, 110 S.Ct. at 2789-2802. Our result is consistent with *Rodriguez*. As we have explained, in light of *Bostick*, the troopers in this case could not reasonably have concluded that the bag was abandoned from the mere fact that the passengers were silent when asked if anyone owned the bag.

The State argues that we should extend the "good faith" doctrine articulated in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to warrantless searches, thereby precluding application of the exclusionary rule where the police act in good faith. The record reflects that the police were clearly aware of the passengers' right to remain silent or to leave the bus during the interdiction. Therefore, we need not reach this issue because we conclude that the police could not, in good faith, have inferred abandonment from the passengers' silence.

For the foregoing reasons, we conclude that the trial court erred in denying Petitioner's motion to suppress the drugs. In addition, Petitioner's subsequent statement to the troopers should have been suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 484-87, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963); *Gadson v. State*, 341 Md. 1, 8-9, 668 A.2d 22, 26 (1995).

We recognize the gravity of the drug problem and acknowledge the need for investigatory techniques that respond to the increasingly sophisticated methods

employed by drug traffickers. As Justice Powell wrote in *United States v. Mendenhall*, 446 U.S. 544, 561-62, 100 S.Ct. 1870, 1881, 64 L.Ed.2d 497 (1980) (Powell, J. concurring):

> The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.

We note, moreover, that not every encounter between police and private citizens during drug interdictions triggers Fourth Amendment scrutiny. As the Supreme Court stated in *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983):

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification.

Id. at 497, 103 S.Ct. at 1324 (citations omitted); *see also Mendenhall*, 446 U.S. at 555, 100 S.Ct. at 1877-78 (person is not seized where plainclothes agents asked for identification and ticket, and she agreed to cooperate, even if agents did not expressly tell respondent she was free not to cooperate). Thus, police may approach private citizens

and ask questions or ask for identification without individualized suspicion or probable cause, provided the encounter is consensual. Furthermore, if, as a result of these inquiries, police ask for and receive voluntary consent to search a citizen or his possessions, the Fourth Amendment does not apply. *Mendenhall*, 446 U.S. at 559, 100 S.Ct. at 1879-80. Although the facts of the drug interdiction search at issue in this case render it unlawful, many drug interdictions may be conducted without violating the Fourth Amendment. *See Guerra, supra.*

Moreover, although we find today that, under the circumstances presented in the instant case, the police search of Petitioner's luggage was unlawful, we stress that our holding is limited to the conduct of the police when they are acting in their criminal investigatory capacity. As the Iowa Supreme Court stated in discussing the rationale for the emergency-aid exception to the warrant requirement:

> In essence police officers function in one of two roles: (1) apprehension of criminals (investigative function); and (2) protecting the public and rescuing those in distress (caretaking function). Courts have noted that preservation of human life is paramount to the right of privacy protected by the fourth amendment. Thus the emergency-aid exception is justified because the motivation for the intrusion is to preserve life rather than to search for evidence to be used in a criminal investigation.

State v. Carlson 548 N.W.2d 138, 141 (Iowa 1996) (citations omitted). Our holding does not apply to situations in which the police are acting to protect public safety pursuant to their community caretaking function, *e.g.*, by attempting to identify a package that might contain a bomb. *See Gadson*, 341 Md. at 17-18, 668 A.2d at 30-31. Although there are situations in which an unclaimed package or piece of luggage may arouse suspicions of an

explosive, in the case before us, the police relied solely on the drug interdiction protocol and articulated no suspicion or belief that the luggage might contain an explosive.

Where the police act in their investigative capacity, their actions must comply with the requirements of the Fourth Amendment. As the Supreme Court stated in *Bostick*:

> This Court . . . is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a "war on drugs." If that war is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime.

501 U.S. at 439, 111 S.Ct. at 2389 (citations omitted).

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED WITH DIRECTIONS TO REMAND THE CASE TO THE CIRCUIT COURT FOR HARFORD COUNTY FOR A NEW TRIAL. COSTS TO BE PAID BY HARFORD COUNTY.

APPENDIX B

Reported

Court of Special Appeals of Maryland.

No. 1394, Sept. Term, 1994

LABARON STANBERRY

v.

STATE OF MARYLAND

June 5, 1995

Submitted before WILNER, C.J., and CATHELL and SALMON, JJ.

CATHELL, Judge.

Appellant, Labaron Stanberry, appeals an order of the Circuit Court for Harford County (Carr, J., presiding), which denied his motion to suppress evidence of controlled dangerous substances found in a bag located in the overhead compartment of a commercial bus on which he was a passenger. Appellant was later found guilty by the court, on an agreed Statement of Facts, of bringing heroin in an amount exceeding four grams into Maryland and was sentenced to fifteen years incarceration. All but three years were suspended in favor of two years probation with credit for time served. The State urges

affirmance of the trial court based on general principles of reasonableness. Appellant relies on the Fourth Amendment for his challenge, alleging on appeal that the trial court erred in denying his motion to suppress the evidence.

THE FACTS

On August 16, 1993, at approximately 9:00 p.m., several Maryland State Police officers were stationed at Maryland House on the I-95 corridor. These officers, a part of the State Police's Support Enforcement Division of the Drug Interdiction Unit, are "responsible for interdicting drugs on commercial carriers such as airplanes, buses and AMTRAC [sic] trains."[1] The officers' purpose that night was "to interdict the illegal contraband, guns and drugs coming into the State of Maryland via Greyhound and other buses that stop" at Maryland House.

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[1] The ability of law enforcement officers to board a commercial bus and enlist the cooperation of its passengers in combatting drug trafficking is without question. *United States v. Flowers*, 912 F.2d 707, 709 (4th Cir.1990), *cert. denied*, 501 U.S. 1253, 111 S.Ct. 2895, 115 L.Ed.2d 1060 (1991) ("Police may seek the voluntary cooperation of citizens in law enforcement activities without implicating the Fourth Amendment.") Just as an officer may approach an individual on the street and attempt to elicit information from him, so may that officer approach a bus passenger, without offending the Fourth Amendment, so long as the person being approached feels free to disregard the inquiry and does not feel compelled to comply with the officer's requests. *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991). *See also United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497, *reh'g denied*, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980).

The officers were dressed in plain clothes and were awaiting the arrival of buses at the rest stop. Around 9:00 p.m., a Greyhound bus from New York City arrived at the rest area. The passengers, including appellant, alighted for the twenty minute stop.[2] After approximately twenty minutes had passed, the officers asked the bus driver, who was familiar with the Interdiction Unit's activities, if all the passengers had resumed their seats. The driver performed a head count and indicated to the officers that all were present. At that time, Trooper Edward Burnette made an announcement over the driver's microphone identifying himself and TFC Michael Milburn as police officers and explaining the purpose for their presence on the bus. He also told them that he sought their cooperation in identifying their respective baggage in the overhead compartments. Trooper Milburn began this process at the far end of the bus, while Trooper Burnette began questioning passengers at the front.

Roughly six seats in, the troopers observed what has been described as a black suit bag in the overhead area. When no one claimed ownership of the bag, Trooper Burnette continued down the aisle and, upon completing the identification of all the other baggage, again asked to whom the previously unclaimed bag belonged. Again, he received no response. He repeated his inquiry over the driver's microphone, holding the bag up for all the passengers to see. No one responded. At that point, Trooper Burnette considered the bag to have been abandoned, testifying at the suppression hearing that it had been his experience that "when a bag is not claimed . . . [there] is possibly illegal substances in the bag." All told, this procedure took approximately two minutes to

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[2] Neither the officers nor the bus driver performed a count of the passengers as they disembarked from the bus.

complete and, during this time, the driver was not present on the bus.

The bag was then taken off the bus and opened, revealing approximately three hundred packets of heroin and a quantity of cocaine inside. The bag was then closed and Trooper Burnette reboarded the bus to "find a suspect, someone that looked nervous or just . . . suspicious . . . that would indicate that [the bag] might be his. . . ." While Trooper Burnette was on the bus, appellant approached the vehicle in an attempt to reboard but was detained by the driver, who believed him not to be a passenger. The driver, however, soon acknowledged that appellant was in fact a passenger. Before appellant boarded the bus, Corporal Kevin Welkner asked if the still unclaimed bag, which then hung on the door handle of the bus, belonged to him. Appellant indicated that it did and then, immediately, that it did not. Upon further questioning, appellant is said to have informed Corporal Welkner and Trooper Burnette, who had disembarked by this time, that the controlled dangerous substances that were found were his and that he had been paid three hundred dollars to make the trip to New York City from Richmond, Virginia. Appellant was then placed under arrest and taken to police headquarters.

Prior to trail, appellant moved to suppress the evidence of the controlled dangerous substances, alleging that the search of the bus and seizure of the bag had been unlawfully carried out and that his subsequent statements should be suppressed as "fruit of the poisonous tree," *i.e.*, emanating from the illegal search. The trial court denied the motion and appellant was found guilty of the underlying charges. He filed this timely appeal therefrom.

LEGAL ANALYSIS

In reviewing the denial of a motion to suppress, we look

only to the record of the suppression hearing and do not consider the record of the trial. *Trusty v. State*, 308 Md. 658, 670-71, 521 A.2d 749 (1987) (quoting *Jackson v. State*, 52 Md.App. 327, 332 n.5, 449 A.2d 438, *cert. denied*, 294 Md. 652 (1982)); *Watkins v. State*, 90 Md.App. 437, 439, 601 A.2d 1115, *cert. denied*, 327 Md. 80, 607 A.2d 921 (1992); *Pharr v. State*, 36 Md.App. 615, 618, 375 A.2d 1129, *cert. denied*, 281 Md. 742 (1977). We are further limited to considering only those facts that are most favorable to the State as the prevailing party on the motion. *Riddick v. State*, 319 Md. 180, 183, 571 A.2d 1239 (1990). *See also Simpler v. State*, 318 Md. 311, 312, 568 A.2d 22 (1990). In considering the evidence presented at the suppression hearing, we extend great deference to the fact finding of the suppression judge with respect to determining the credibility of the witnesses and to weighing and determining first-level facts. *Perkins v. State*, 83 Md.App. 341, 346, 574 A.2d 356 (1990). When conflicting evidence is presented, we must accept the facts as found by the hearing judge unless it is shown that his findings are clearly erroneous. *Riddick*, 319 Md. at 183, 571 A.2d 1239. Even so, as to the ultimate, conclusionary fact of whether a search was valid, we must make our own independent constitutional appraisal by reviewing the law and applying it to the facts of the case. *Id.*; *Perkins*, 83 Md.App. at 346, 574 A.2d 356. With this in mind, we turn to the case *sub judice*.

The trial court, in ruling on appellant's motion to suppress, made the following findings of fact:

> That the Defendant in this case left the bus, as did everyone else that was an occupant, who went into the Maryland House for refreshments or whatever. And that this included the Defendant.
>
> And that at the time he left the bus to go to the restaurant or the rest room that he had no intention of abandoning the property which was his, namely the

black bag or luggage.

And that . . . he willfully intended to return to the bus and secure possession of his property and be on his way.

Having found that, I also find that since it was luggage and was his and it had contents, that he had a legitimate expectation of privacy in the luggage.

. . . .

And I find as a fact that it was a logical inference, and a reasonable inference for the Troopers to then regard the property as abandoned since no one on the bus had owned up to it as being theirs.

And I also find that it is reasonable under those circumstances to examine the contents of the bag, having inferred from the facts that the property had been abandoned.

The trial court then proceeded to discuss the Fourth Amendment implications of the interdiction at issue:

So the first question we have to answer is whether or not under the Fourth Amendment this is an unreasonable search and unreasonable seizure.

There is an abandoned property doctrine which basically provides it is not unreasonable to make an exploratory examination of property that has been abandoned. And the rationale behind that is because there is no expectation of privacy in . . . property that has been abandoned.

. . . .

In this case, the facts on the surface to the police officers appeared or showed that the property was abandoned, when in fact this was not correct, since the rather unusual facts in this case were that the Defendant wasn't on the bus, he didn't have an opportunity to speak up whether it was his or not and . . . no one else owned up to it, which makes sense, because it wasn't anyone else's bag.

I would find from this that the Troopers had no reason to believe that the property was not abandoned. There was no factor there that would point to anything other than nobody owning up to the property, therefore it looks like it's abandoned.

I am going to find . . . that where the facts reasonably show abandonment, even though that's not the case, then it is reasonable to examine the contents of property that appears to be abandoned.

Getting ... back to the issue of expectation of privacy, that's not the whole answer. The fact that somebody has the expectation of privacy in property is only a part of it. A person that has such an expectation cannot complain where the search is otherwise said to be reasonable.

. . . .

. . . In fact as far as I can see, this search and seizure is no more unreasonable than searching a bag that the Defendant does not claim as his own—tracking the facts of the [*Florida v.*] *Bostick* decision.

Upon our independent constitutional appraisal, we conclude that the trial court was correct. We shall affirm. We further explain.

A fundamental tenet of the Fourth Amendment is a person's right to be secure in his or her "person[], house[], papers, and effects, against unreasonable searches and seizures. . . ."[3] U.S. Const. amend. IV. Indeed, Fourth

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[3] "The basic purpose of th[e Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528, 87 S.Ct. 1727[, 1730, 18 L.Ed.2d 930] (1967). To this end, "[t]he mandate of

Amendment jurisprudence has jealously guarded this right. It is, however, not without its limitations. The "'capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'" *Minnesota v. Olson*, 495 U.S. 91, 95, 110 S.Ct. 1684, 1687, 109 L.Ed.2d 85 (1990) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978), *reh'g denied*, 439 U.S. 1122, 99 S.Ct. 1035, 59 L.Ed.2d 83 (1979)). An expectation of privacy is considered "legitimate" if it is "'one that society is prepared to recognize as "reasonable."'" *Id.* (quoting *Rakas*, 439 U.S. at 143-44 n. 12, 99 S.Ct. at 430 n. 12 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring))). *See also Brashear v. State*, 90 Md.App. 709, 722-23, 603 A.2d 901, *cert. denied*, 327 Md. 523, 610 A.2d 796 (1992); *Kitzmiller v. State*, 76 Md.App. 686, 689-94, 548 A.2d 140 (1988).

When the setting in which a search and seizure takes place is a commercial bus, the lawfulness *vel non* of the government's intrusion is less clear. *See United States v. Rem*, 984 F.2d 806, 812 (7th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 300, 126 L.Ed.2d 248 (1993) (privacy interest of those utilizing public thoroughfares who place luggage on publicly available rack is substantially diminished). Indeed, that expectation of privacy that society is prepared to categorize as "reasonable" is altered

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> the Fourth Amendment is that the people shall be secure against *unreasonable* searches." *United States v. Rabinowitz*, 339 U.S. 56, 65, 70 S.Ct. 430[, 435, 94 L.Ed. 653] (1950).

Duncan and Smith v. State, 281 Md. 247, 254, 378 A.2d 1108 (1977).

in an environment where one's property is so easily accessible to the public. *Katz v. United States*, *supra*, and its progeny "established a two-pronged test for determining whether the government intruded upon an individual's reasonable expectation of privacy. First, an individual must demonstrate that he had an actual subjective expectation of privacy. Second, society must be willing to recognize that expectation as reasonable." *Kitzmiller*, 76 Md.App. at 690, 548 A.2d 140. We are quick to note, however, that one does not forfeit all Fourth Amendment protection merely by choosing to travel on commercial carriers.

Fourth Amendment protection does not extend, however, to property that has been "abandoned." *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668, *reh'g denied*, 362 U.S. 984, 80 S.Ct. 1056, 4 L.Ed.2d 1019 (1960). Abandonment effects a relinquishment by the owner of the expectation of privacy, if any, in the property being abandoned.[4] *Brown v. State*, 75 Md.App. 22, 36,

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[4] It is the expectation of privacy which is at the heart of the test for abandonment. "'The proper test . . . is not whether all formal property rights have been relinquished, but whether the complaining party retains a reasonable expectation of privacy in the articles alleged to be abandoned.'" *Venner v. State*, 279 Md. 47, 53 [367 A.2d 949] (1977), quoting *United States v. Wilson*, 472 F.2d 901 (9th Cir.1972), *cert. denied*, 414 U.S. 868 [94 S.Ct. 176, 38 L.Ed.2d 116] (1973).

Duncan and Smith, 281 Md. at 262, 378 A.2d 1108. *See also State v. Boone*, 284 Md. 1, 6-8, 393 A.2d 1361 (1978).

540 A.2d 143, *cert. denied*, 313 Md. 31, 542 A.2d 858 (1988) (citing *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed 898 (1924)). It is for this reason that searches of abandoned property do not fall within the purview of the Fourth Amendment and trigger none of its implications.[5] *Hawkins v. State*, 77 Md.App. 338, 342, 550 A.2d 416 (1988); *Duncan and Smith v. State*, 281 Md. 247, 262, 378 A.2d 1108 (1977) ("[O]ne who abandons property thereby surrenders any expectation of privacy therein, removes himself from the protection of the Fourth Amendment, and 'cannot complain with [the] effect of the later seizure of such property by the police, or of its use against him in court.'" (quoting *Henderson v. Warden*, 237 Md. 519, 523, 206 A.2d 793 (1965); *Matthews v. State*, 237 Md. 384, 387-388, 206 A.2d 714 (1965))). *See also Hester, supra.*

In determining whether property has been abandoned, courts must look to the actions and intentions of the property owner. *Everhart v. State*, 274 Md. 459, 483, 337 A.2d 100 (1975) ("[W]hether property is abandoned is generally a question of fact based upon evidence of a combination of act and intent."). ""[I]ntent may be

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[5] *See United States v. Morris*, 738 F.Supp. 20, 23 (D.D.C.1990), *aff'd sub nom. United States v. Ramos*, 960 F.2d 1065 (D.C.Cir.1992) (quoting 1 W. LaFave, *Search and Seizure*, § 2.6(b) (2d ed. 1987)):

> In the law of search and seizure, however, the question is whether the defendant has, in discarding the property, relinquished his reasonable expectation of privacy so that its seizure and search is reasonable within the limits of the Fourth Amendment. . . . In essence, what is abandoned is not necessarily the defendant's property, but his reasonable expectation of privacy therein. [Citations omitted.]

inferred from words spoken, acts done, and other objective facts. . . . All relevant circumstances existing at the time of the alleged abandonment should be considered. . . ."" *Oken v. State*, 327 Md. 628, 651, 612 A.2d 258 (1992), *cert. denied*, — U.S. —, 113 S.Ct. 1312, 122 L.Ed.2d 700 (1993) (quoting *Duncan and Smith*, *supra* 281 Md. at 265, 378 A.2d 1108 (quoting *United States v. Colbert*, 474 F.2d 174, 176 (5th Cir.1973) (citations omitted))). *See also Faulkner v. State*, 317 Md. 441, 449, 564 A.2d 785 (1989). "Intent must be ascertained from what the actor said and did; intent, through subjective, is determined from the objective facts at hand." *Duncan and Smith*, *supra* 281 Md. at 264, 378 A.2d 1108 (citing *Hawley v. Commonwealth*, 206 Va. 479, 144 S.E.2d 314, 317 (1965), *cert. denied*, 383 U.S. 910, 86 S.Ct. 894, 15 L.Ed.2d 665 (1966)). *See also United States v. Perkins*, 871 F.Supp. 801 (N.D.Pa.1995); *United States v. McDonald*, 855 F.Supp. 267 (S.D.Ind.1994).

In *Morton v. State*, 284 Md. 526, 397 A.2d 1385 (1979), a case that the trial court in the instant case distinguished on the facts, police officers stopped Morton following receipt of information possibly linking him with an armed robbery that had occurred the night before. At the time, he was wearing a black jacket and carrying a plastic bag. Finding nothing, the police allowed Morton to go, but placed him under surveillance. More information confirmed that Morton was the person whom the police were seeking. He was confronted at a recreation center and told to accompany the officer and to bring the jacket and bag with him. Morton, not knowing that the officers knew otherwise, informed the officer that he had given the items to a cousin who had left the recreation center. The officers then conducted a search of the facility for the items, which were found lying on the floor in a different area than that in which Morton was confronted and "away from everybody." *Id.* at 528, 397 A.2d 1385. A search of

the contents of the bag revealed a handgun, a quantity of marijuana, and photographs of appellant. A motion to suppress these items was denied. We affirmed in an unpublished opinion. The Court of Appeals reversed, stating that Morton did in fact have a reasonable expectation of privacy in the contents of the bag and jacket. *Id.* at 533, 397 A.2d 1385. The Court further held that Morton neither did nor said anything that would have indicated an intent to abandon this privacy interest in the articles. The Court further refused to infer an abandonment from the mere location of the items at issue. Morton's untruthfulness as to the location of the jacket and bag was not sufficient to justify the intrusion. The police, therefore, did not act reasonably in believing the bag to have been abandoned and the search thereof was unlawful.

A similar scenario was presented in *State v. Boone*, *supra*. Maryland Code (1974), § 8-401(a) of the Real Property Article, authorized the sheriff, after institution of the proper proceedings pursuant thereto, to deliver to a landlord possession of premises for which a tenant has failed to pay rent. In *Boone*, the sheriff was so authorized and, upon arrival at the apartment, a "thorough" search of the premises was undertaken.[6] Boone was not present. The search revealed a number of stolen credit cars and a stolen checkbook. Boone moved to suppress the evidence. The State sought to justify the seizure on abandonment

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[6] The search encompassed the inside of closets and drawers, the pockets of clothing, and the contents of boxes. It was not clear to the Court of Appeals the basis for the authorization to conduct such an invasive search, through testimony indicated that certain items, such as jewelry and weapons, which could not be placed out on the street for safety reasons, would be held for the tenant. Other items, such as personal papers, credit cards, and effects would, however, be removed to the street.

grounds. The Court of Appeals refused, stating that it was not reasonable to conclude that Boone's failure to pay rent or redeem the premises was sufficient to constitute a relinquishment of his reasonable expectation of privacy in the stolen items. "His conduct did no more than give up a right to have the goods remain in the apartment." 284 Md. at 8, 393 A.2d 1361.

In the case *sub judice*, it is undisputed that appellant did not intend to abandon the bag when he disembarked from the bus at the rest stop. Appellant neither said nor did anything to indicate such an intent and his actions in returning to the bus to reboard and continue the trip back to Richmond further support that appellant retained an expectation of privacy in the bag and its contents. The trial court, in fact, properly so found. As the trial court indicated, however, the inquiry does not end here. Although the bag was not actually abandoned, we must look to the reasonableness of the officers' belief that the bag, in their objective opinion, had been abandoned.

Because not all searches and seizures overseen by the government are prohibited, "'[t]he touchstone of the Fourth Amendment is reasonableness,'" *McMillian v. State*, 325 Md. 272, 281, 600 A.2d 430 (1992) (quoting *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801, 1803, 114 L.Ed.2d 297 (1991)), and the touchstone of reasonableness, "sufficient probability, not certainty. . . ." *Hill v. California*, 401 U.S. 797, 804, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484 (1971). Reasonableness may be determined by balancing "the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093, 1096, 108 L.Ed.2d 276 (1990). We illustrate what is necessary to sustain an otherwise unlawful search and seizure by the following cases.

In *Maryland v. Garrison*, 480 U.S. 79, 107 S.Ct. 1013,

94 L.Ed.2d 72 (1987), a warrant was issued to search the person of one McWebb and "the premises known as 2306 Park Avenue third floor apartment." 480 U.S. at 80, 107 S.Ct. at 1014. Upon arriving at the residence to execute the warrant, the police officers discovered that the third floor was in fact divided into two apartments, one occupied by McWebb and the other by Garrison. Before realizing that they were in Garrison's apartment, however, the officers discovered the contraband used to convict him on narcotics distribution charges. Once the officers became aware that they were not searching McWebb's residence, however, they discontinued their search and made no further search thereof. Indeed, "[a]ll of the officers reasonably believed that they were searching McWebb's apartment." *Id.* at 81, 107 S.Ct. at 1015.

After upholding the validity of the warrant, the Court addressed the reasonableness of the manner in which the warrant had been executed, stating that it "recognized the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Id.* at 87, 107 S.Ct. at 1018. *See Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879, *reh'g denied*, 338 U.S. 839, 70 S.Ct. 31, 94 L.Ed. 513 (1949) ("[T]he mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."). The objective facts that were available to the officers executing the warrant indicated that a search of the entire third floor was to be undertaken without distinction between the two apartments. The Court held that "the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment." *Id.*, 480 U.S. at 88-89, 107 S.Ct. at 1019.

The Court of Appeals of this State has also addressed the issue of the reasonableness of police conduct in

relation to the Fourth Amendment, seeing a reasonableness standard generally, though finding it did not exist on the facts presented. In *McMillian v. State*, *supra*, the police were conducting surveillance of a night club known for narcotics distribution. At some point during the surveillance, all officers involved int he investigation assembled at the police station for a meeting with the officer in charge of the investigation. Several officers then returned to the location of the club without having secured a warrant for its search. It was later that day that police officers entered and performed the warrantless search complained of under the belief that the narcotics thought to be located therein would be destroyed if action were not taken to safeguard the evidence.

In invalidating the lawfulness of the entry, the Court looked to what the officers reasonably believed *at the time of their warrantless entry*. *See United States v. Owens*, 848 F.2d 462, 465 (4th Cir.1988). The Court questioned that circumstances necessitating immediate entry had presented themselves, given that any exigencies that had been presented were apparently insufficient to justify a warrantless search prior to the meeting at the police station. Based on the Court's determination that the exigency, if any, had dissipated by the time the officers made their warrantless entry after having returned from the meeting, the Court held that the officers had not been reasonable in believing that the evidence would be destroyed before a warrant could be obtained.

United States v. Owens, *supra*, further elaborates on the analysis to be undertaken in determining the *reasonableness* of officers' conduct under the Fourth Amendment. Under facts remarkably similar to those set forth by *Maryland v. Garrison*, *supra*, a warrant was issued, describing the place to be searched as "Apartment 336." When officers arrived at the building, there was no such apartment; the third floor consisted of an unoccupied

apartment and apartment 324, occupied by Owens. Owens unsuccessfully moved to suppress evidence of six hundred packets of heroin found in a briefcase in her closet.

Drawing on *Garrison* for support, the United States Court of Appeals for the Fourth Circuit held that the officers had made an "honest mistake," which "should be gauged by the standard set forth in *Garrison*." 848 F.2d at 465. The court further stated that suppression of the evidence "would clearly run counter to the reasoning of *Garrison* . . . 'brand[ing] as illegal the execution of any warrant in which, due to a mistake in fact, the premises intended to be searched vary from their description in the warrant.'" *Id.* at 466 (quoting *Garrison, supra*, 480 U.S. at 89 n. 14, 107 S.Ct. at 1019 n. 14).

In the case *sub judice*, we are presented with much the same situation. While the aforementioned cases factually vary from the case at bar, their underlying rationale — that reasonableness is to be tested by that which the officer believed at the time of the alleged Fourth Amendment violation — is equally applicable here.

In the instant case, the bus driver indicated to the officers that all the passengers had reboarded the bus. It was not until then that the officers began the interdiction process. Upon finding the bag and prior to opening it, the officers repeatedly inquired as to which of the passengers it might belong. These inquiries went unanswered. In their objective opinion, because they believed all the passengers that might have claimed ownership of the bag were present on the bus, they believed the bag had been abandoned. The trial court did not clearly err in stating that, although actual abandonment had not occurred, the officers, based on their knowledge and experience, acted reasonably in presuming the bag had been abandoned, based generally and on their knowledge at the specific time of the search. Moreover, "[t]o suppress the evidence in the fact of such subdued official conduct would render

all such interdiction programs suspect. . . . " *Flowers*, 912 F.2d at 712.

On the facts presented by this case, the officers' reasonable and objective basis for concluding that the bag had been abandoned was "much more than a calculated guess and cannot be described as an effort to conduct a fishing expedition. . . . The extreme sanction of exclusion would be inappropriate. . . ." *Owens*, 848 F.2d at 466. That is not to say, however, that searches of this type will not be invalidated. While close scrutiny of interdiction claims of "reasonableness" is required by the Fourth Amendment to guard against contrived situations, our independent examination of the facts here present leads us to conclude, as did the trial court, that the officers acted reasonably. There may be many interdiction situations in which the intrusion on Fourth Amendment protections will be unreasonable. This, however, is not such a case.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

APPENDIX C

Trial court's ruling of March 24, 1994 in the Circuit Court for Harford County, Maryland, The Honorable Maurice W. Baldwin, Jr., *State of Maryland v. Labaron Stanberry*, Criminal Case No. 93C0891

* * *

THE COURT: This is an interesting case. It's the kind of case you might expect to see on a bar exam. It's not the kind of question that routinely pops up in a criminal case.

And I wish I had the luxury of time that would be available, seven weeks probably, to take this matter under advisement and issue a long and scholarly work. The issue involved is intriguing and I would much enjoy the exercise of the complicated analysis.

However, given that this case has popped up in the midst of ten or so other matters that I have touched on or am concerned with today on the Court's calendar, and the fact that this Defendant is awaiting trial and incarcerated, I don't have the luxury of taking six or seven weeks to analyze it. The need is to come to a decision this afternoon.

I make the following findings of fact. That the Defendant in this case left the bus, as did everyone else that was an occupant, who went into the Maryland House for refreshments or whatever. And that this included the Defendant.

And that at the time he left the bus to go to the restaurant or the rest room that he had no intention of abandoning the property which was his, namely the black bag or luggage.

And that I would find that he willfully intended to return to the bus and secure possession of his property and be on his way.

Having found that, I also find that since it was luggage and was his and it had contents, that he had a legitimate expectation of privacy in the luggage.

I also find as a fact that all of the occupants of the bus save one had returned to the bus, and that the person that had not returned was the Defendant.

And then the Troopers appear on the scene and confer with the driver. The driver counts heads and informs the Troopers that everyone has returned, when in point of fact the driver was mistaken and either he miscounted or he had a wrong figure as to the number of occupants of the bus.

As already indicated, in point of fact the Defendant in this case had not returned. The Troopers then proceeded to go up and down the isle [sic] and noticed this black bag in a carrier above the seats and on two occasions asked the occupants of the bus, minus the Defendant, who owned the bag. There of course was no response, because this Defendant was not present.

And I find as a fact that it was a logical inference, and a reasonable inference for the Troopers to then regard the property as abandoned since no one on the bus had owned up to it as being theirs.

And I also find that it is reasonable under those circumstances to examine the contents of the bag, having inferred from the facts that the property had been abandoned.

In point of fact after exploratory examination the bag did in fact reveal controlled dangerous substances. After the bag is examined and the contents found, and the contents were obviously controlled substances, or at least obvious to the officer, the bag is then hung on the bus door.

And then the Defendant returns and has a conversation with the driver something to the effect, the driver says look you are not on this bus and then an unspecified

conversation takes place between the Defendant and the driver, the result of which was the driver saw his error and recognized that he in fact was a passenger on the bus.

At that point the one Trooper asks him whether or not it's his bag and he quickly answers it's mine and then sees he has given an answer that might be harmful, since he then concluded it's a Trooper, a police authority and says no it's not.

So the first question we have to answer is whether or not under the Fourth Amendment this is an unreasonable search and unreasonable seizure.

There is an abandoned property doctrine which basically provides it is not unreasonable to make an exploratory examination of property that has been abandoned. And the rationale behind that is because there is no expectation of privacy in something -- in property that has been abandoned.

A simple example is if you put a trash can full of whatever at the end of your driveway for pick up by -- pick up by trash men, you have no expectation of privacy in that property since you are intending for this to go away, intending for it to leave your property, you are intending to never have it again. So there is nothing unreasonable about police authorities turning your trash can over and looking at property that you have discarded.

In this case, the facts on the surface to the police officers appeared or showed that the property was abandoned, when in fact this was not correct, since the rather unusual facts in this case were that the Defendant wasn't on the bus, he didn't have an opportunity to speak up whether it was his or not and he wasn't there, and no one else owned up to it, which makes sense, because it wasn't anyone else's bag.

I would find from this that the Troopers had no reason to believe that the property was not abandoned. There was no factor there that would point to anything other than

nobody owning up to the property, therefore it looks like it's abandoned.

I am going to find, ladies and gentlemen, that where the facts reasonably show abandonment, even though that's not the case, then it is reasonable to examine the contents of property that appears to be abandoned.

Getting to the issue of -- back to the issue of expectation of privacy, that's not the whole answer. The fact that somebody has the expectation of privacy in property is only a part of it. A person that has such an expectation cannot complain where the search is otherwise said to be reasonable.

So you have an interest, you have an expectation of privacy in your house, but if there is a search warrant supported by probable cause then you don't have any room to complain. And I am going to find this is the same kind of situation.

I would distinguish the case of Morton versus State, in that in that particular case the Court of Appeals specifically held that the facts did not show to the police officers that the property was abandoned. In other words they could not infer from the facts of that matter that there was any abandonment of property. So I think that is clearly distinguishable.

And even though the Defendant had a privacy expectation, since the property was not in fact abandoned, the Troopers had a rational reliable fact from which to infer otherwise.

And I find under those facts that it is not unreasonable to search and seize the bag in this case. In fact as far as I can see, this search and seizure is no more unreasonable than searching a bag that the Defendant does not claim as his own -- tracking the facts of the Bostick decision.

So for those reasons the Court will deny the motion to suppress the CDS and wait with anxious expectation the written opinion of the Court of Special Appeals and

probably Court of Appeals. Interesting case. Do we now deal with the issue of the statements of the Defendant?

MR. MERRIAM: Your Honor, I think that it's moot in light of Your Honor's ruling.

THE COURT: Very well sir.

MR. MERRIAM: There went my argument on the statements. Very well, thank, you Your Honor.

THE COURT: Thank you, sir. Anything further?

MR. COMEN: No, Your Honor.

THE COURT: Take a recess.

* * *

Supreme Court, U.S.
FILED
APR 9 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND	*	
Petitioner	*	
v.	*	**No. 96-1248**
LABARON STANBERRY	*	
Respondent	*	

* * * * * * * * * * * * * * *

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Labaron Stanberry, who has been found to meet the qualifications for representation by the Office of the Public Defender of the State of Maryland, asks leave to proceed *in forma pauperis* pursuant to Rule 39. Counsel for Respondent is unable to attach an affidavit in support of this motion, signed by Respondent and notarized by a notary public, for the following reasons. As soon as counsel for Respondent received William Suter's letter requesting a brief in opposition to the State of Maryland's Petition for Writ of Certiorari in this case, counsel for Respondent sent the affidavit in support of the motion to proceed *in forma pauperis* to Respondent at his current address in New Jersey. Respondent had been given permission by the Maryland trial court to have his probation transferred to New Jersey and said probation was in fact transferred on June 27, 1996. Respondent has not yet responded to the letters sent to him by counsel regarding the affidavit in support of the motion to proceed *in forma*

pauperis and has not yet returned the affidavit. The State of Maryland Interstate Compact Unit, which indirectly supervises out-of-state probationers, is attempting to locate Respondent and assist counsel for Respondent in obtaining the necessary affidavit. As soon as such affidavit can be obtained, counsel for Respondent will forward it to this Court.

Respectfully submitted,

Melissa Moore
Assistant Public Defender
6 St. Paul Street, Suite 1302
Baltimore, MD 21202
(410) 767-8544

Counsel for respondent

96-1248

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF MARYLAND,

Petitioner

v.

LABARON STANBERRY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEPHEN E. HARRIS
Public Defender

Melissa M. Moore
Assistant Public Defender
Counsel of Record

Office of the Public Defender
Appellate Division
6 St. Paul Street, Suite 1302
Baltimore, Maryland 21202
(410) 767-8529

Counsel for respondent

IN THE
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STATE OF MARYLAND	*	
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v.	*	**No. 96-1248**
LABARON STANBERRY	*	
Respondent	*	

* * * * * * * * * * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of April, 1996, three copies of respondent's Brief in Opposition and Motion for Leave to Proceed in Forma Pauperis were hand delivered to Gary E. Bair, Esquire, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Street, Baltimore, Maryland 21202, (410) 576-6422, counsel for petitioner.

Melissa M. Moore
Assistant Public Defender
6 St. Paul Street, Suite 1302
Baltimore, MD 21202
(410) 767-8529

Counsel for respondent

QUESTIONS PRESENTED

Whether the Court of Appeals of Maryland correctly held that the lower court erred in denying Respondent's motion to suppress the contents of his suitcase which was left on a Greyhound bus during a twenty minute stop at the Maryland House and which was searched in Respondent's absence after police officers held it up and asked the passengers on the bus whether it belonged to them and received no response?

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96-1248

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ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, LaBaron Stanberry, by counsel, Stephen E. Harris, Public Defender of Maryland, and Melissa M. Moore, Assistant Public Defender, Office of the Public Defender for the State of Maryland, respectfully request that the Court deny the petition for writ of certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

Trooper Edward Burnette testified that on August 16, 1993, he was working with Corporal Kevin Welkner and Trooper Michael Milburn monitoring Greyhound buses at the Maryland House on Interstate I-95 as part of a routine drug interdiction program. (M. 5-7).[1] At 8:55 p.m., the bus on which Respondent was traveling arrived at the rest stop and the passengers disembarked for a twenty minute break. (M. 7-10). The officers did not count the passengers as they exited the bus nor did they see the bus driver count the passengers. (M. 31). Trooper Burnette spoke to the bus driver and received permission to board the bus. M. 10). At 9:20 p.m., the passengers began reboarding the bus, after which the bus driver "took a count" and was satisfied that everybody was back on the bus. (M. 11). At that time, the bus was two hundred yards away from the Maryland House and not visible to anyone inside the Maryland House. (M. 12, 38).

Trooper Burnette then boarded the bus, announced to the passengers that they were having a problem with drugs being transported on commercial buses through the state, and asked for their cooperation in showing their bags, "just pointing them out as we asked what bags they had on the bus or what luggage." (M. 11). Once the announcement was made, Troopers Burnette and Milburn began asking the passengers to show them their luggage. (M. 12). When Trooper Burnette came to the sixth seat on the left-hand side, he observed a black suit bag in an overhead

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[1] Transcript references are to the motion to suppress hearing in the Circuit Court for Harford County held on March 24, 1994.

compartment and asked if the bag belonged to anyone in the area. (M. 12). No one claimed the bag. (M. 12). Trooper Burnette did not recall whether there was a vacant seat near the unclaimed bag. (M. 30). He moved on and completed his questioning with respect to the other bags then returned to the black suit bag. (M. 13). He asked again if the bag belonged to anyone and no one claimed the bag. (M. 13). Trooper Burnette then took the bag from the overhead compartment and held it over his head at the front of the bus. (M. 13). Again no one claimed the bag. (M. 13). Trooper Burnette testified that at that point he considered the bag to be abandoned property and took it off the bus and searched it. (M. 14). Inside the bag, he found a white paper bag containing four wrapped "baggies," one containing suspected cocaine and three containing suspected heroin. (M. 14). The suspected heroin was separated into approximately three hundred packets. (M. 14).

Trooper Burnette testified that there were no weapons displayed during the procedure of bag identification. (M. 14). He did not recall any specific conversations with passengers as he went along. (M. 15). The entire procedure took "no longer than two minutes." (M. 15). Trooper Burnette stated that during interdiction stops all passengers are able to move around and are free to leave the bus. (M. 23). He further stated, "Quite frankly when we are on the bus we have them get out and smoke a cigarette or just get off the bus. We don't restrict their movements whatsoever." (M. 23). He did not recall whether anyone stepped off the bus during the interdiction procedure in this case; he stated it was possible. (M.

29). He further stated that they do not really try to "keep track" of the passengers during the interdiction stop; if one gets off they may observe them get off the bus but they do not keep track of them. (M. 32). Trooper Burnette stated that he had never had a passenger get off the bus before identifying their bag but they were free to do so and he would not stop them. (M. 33).

Once Trooper Burnette found the suspected heroin and cocaine, he zipped the bag closed and hung it on the door of the bus. (M. 19). Corporal Welkner watched the bag while Trooper Burnette reentered the bus to attempt to find a suspect. (M. 19). At that point, Respondent, who had been in the Maryland House during the interdiction procedure and search of his bag, approached the bus and attempted to reboard it. (M. 19-21). The bus driver did not think Respondent was a passenger on the bus but then realized he had miscounted and recognized Respondent was, in fact, a passenger on the bus. (M. 21).

At that point, Corporal Welkner asked Respondent whether the bag hanging on the bus door was his and Respondent said it was. (M. 44). Respondent then quickly changed his mind and stated the bag was not his. (M. 44). Corporal Welkner then advised Respondent of his rights and Respondent stated that the bag was his and that he was transporting the drugs in the bag to Richmond, Virginia. (M. 46).

Respondent testified that he was a passenger on the bus and had stored his suit bag in the overhead compartment of the bus. (M. 52). He further testified that

when they arrived at the Maryland House he exited the bus and went inside to use the bathroom and to get something to eat. (M. 52-53). He did not intend to abandon his bag by leaving it in the overhead compartment of the bus while he went inside the Maryland House; he intended to return to the bus and continue his trip. (M. 53).

REASONS FOR DENYING THE WRIT

This case represents a simple and straightforward application of prior precedent of this Court. In several cases, this Court has made clear that although police officers may generally approach an individual in a public place and ask questions of that person, even though they have no basis for suspecting that person is guilty of some wrongdoing, the individuals approached have a corollary right to ignore the officers' questions, refuse to speak to them, and continue their business without regard to the officers' presence. *See Florida v. Bostick*, 501 U.S. 429 (1991)(even when police officers have no basis for suspecting a particular individual, they may generally ask questions of that individual, examine the individual's identification, and request consent to search his or her luggage, as long as the police do not convey a message that compliance with their requests is required); *Florida v. Royer*, 460 U.S. 491, 497-98 (1983)(law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, or by putting questions to him if the person is willing to listen, but the person approached need not

answer any question put to him and may decline to listen to the questions at all and may go on his way; he may not be detained even momentarily without reasonable, objective grounds for doing so, and his refusal to answer questions does not, without more, furnish those grounds); *United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980)(police officers enjoy the liberty possessed by every citizen to address questions to other persons but the person addressed has an equal right to ignore his interrogator and walk away; as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would require some particularized and objective justification); *Brown v. Texas*, 443 U.S. 47, 52-53 (1979)(the application of a Texas statute to detain the defendant and require him to identify himself violated the Fourth Amendment because the officers lacked any reasonable suspicion to believe he was engaged in any criminal conduct; in the absence of any basis for suspecting misconduct, the balance between the public interest and the defendant's right to personal security and privacy tilts in favor of freedom from police interference).

Thus, in this case, the Maryland troopers had the right to board the bus and ask passengers to cooperate with them if they chose to do so and the passengers had the corollary right to ignore the officers and refuse to talk to them or to leave the bus if they so chose. Indeed, Trooper Burnette stated that the passengers were free to move about and leave the bus if they chose and that it was possible one or more of them had done so in this case. He further stated that they do not keep track of the

passengers during an interdiction. Under these circumstances, it is difficult to understand how the troopers could ever *reasonably* conclude that a bag was abandoned when there is nothing more than silence as to its ownership. If passengers are free to come and go as they please and the officers have no idea whether they have left the bus during the interdiction, and if passengers have the right, as they clearly do under the above cited cases of this Court, to simply ignore the troopers and not respond to their questions, then it is patently unreasonable to conclude from mere silence that the passengers have abandoned their baggage when they do not respond to the troopers' questions whether the bag belongs to anyone. *See State v. May*, 608 A.2d 772, 774-776 (Me. 1992)(abandonment cannot be inferred from mere silence in response to police questioning and therefore defendant did not abandon his wallet which he inadvertently lost in police cruiser by merely shrugging his shoulders and not taking steps to secure his wallet in response to police questions regarding wallet); *State v. Joyner*, 66 Haw. 543, 669 P.2d 152, 153-154 (Hawaii 1983)("To equate a passive failure to claim potentially incriminating evidence with an affirmative abandonment of property would be to twist both logic and experience in a most uncomfortable knot" and therefore the court could not find abandonment from defendant's mere silence when a police officer asked him if an unzipped bag located one to two feet away from him in a bath house was his).

Contrary to the Petitioner's assertion in its petition before this Court, the courts are not in conflict over whether abandonment may be inferred from mere

silence. Indeed, Petitioner cites no case which supports the proposition that abandonment may be inferred from silence alone. Courts have held that abandonment may be inferred from actions on the part of the owner of the property which constitute a disclaimer of the property. *See Duncan v. State*, 281 Md. 247, 266-67, 378 A.2d 1108 (1977)(where defendants parked car on stranger's private property, left it there, and then denied any connection with or knowledge of the car in response to police questions, court found they had abandoned car); *United States v. Thompkins*, 998 F.2d 629, 632-33 (8th Cir. 1993)(where defendant denied ownership of a bag in the baggage compartment of the bus and told the officers to search it, court found abandonment of the bag); *United States v. Flowers*, 912 F.2d 707, 711 (4th Cir. 1990)(defendant held to have abandoned his bag located in the overhead bin directly above his seat on Greyhound bus when he expressly disclaimed ownership of it in response to police officer's question). None of the cases cited by Petitioner at pages 11 and 12 of its petition, however, support the proposition that abandonment can be inferred from mere silence. The cases cited by Petitioner fall into one of two categories: (1) those in which courts have held that the defendant's actions constituted a disclaimer and therefore an abandonment of his property and (2) those in which courts have held that the defendant's mere silence could not be considered a disclaimer or abandonment of his property. As the Maryland Court of Appeals noted in this case, there is a significant difference between a disclaimer of ownership and mere silence. "An affirmative disclaimer of owernship is markedly

different from passive failure to claim one's property." *Stanberry v. State*, 343 Md. 720, 733, 735-36, 684 A.2d 823 (1996). Moreover, in this case, the Petitioner has never contended, nor has any lower court found, that Respondent abandoned his black suit bag by virtue of disclaimer.

Nor has the Petitioner in this case contended, or any lower court found, that Respondent abandoned his black suit bag by leaving it unattended on the Greyhound bus on which he was a passenger while he went into the Maryland House for twenty minutes during his rest stop. Prior cases of this Court and other courts would indicate that such an argument would be futile. *See United States v. Place*, 462 U.S. 696, 707 (1983)(recognizing that individuals possess a legitimate expectation of privacy in the contents of their luggage); *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979)(recognizing that luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy); *United States v. Rem*, 984 F.2d 806, 811 (7th Cir. 1993)(failure to retrieve a checked suitcase from a baggage claims area does not automatically constitute abandonment); *United States v. Lee*, 916 F.2d 814, 818 (2d Cir. 1990)(temporarily leaving luggage in a secured area does not indicate abandonment); *United States v. Most*, 876 F.2d 191, 198-99 (D.C. Cir. 1989)(leaving shopping bag with store clerk, as required by store policy, does not constitute abandonment).

The Petitioner's argument in this case has never been that Respondent did anything which would indicate an intent to abandon his property; it consistently has

been that the officers reasonably believed the bag to be abandoned based on the fact that the bus driver told them all of the passengers had reboarded the bus and the fact that no one claimed the bag in response to their questions. The fundamental problem with this argument, which was recognized by the Maryland Court of Appeals, is that it erroneously assumes the passengers on the bus were required to answer the officers when they asked whether the bag belonged to anyone, and it further erroneously assumes that the police officers reasonably believed all passengers were back on the bus despite Trooper Burnette's testimony that he had no idea whether any passengers had gotten off of the bus during the interdiction procedure. Consequently, the Maryland Court of Appeals was correct in stating:

> We conclude that, under the totality of the circumstances, the troopers should not have inferred abandonment from the passengers' silence. As we stated above, in accord with the Supreme Court mandate in *Florida v. Bostick*, in order for the drug interdiction search to meet constitutional requirements, a passenger must feel free to refuse to comply with police requests, to remain silent in response to police questions, and to leave the bus if desired.
>
> In sum, under these circumstances, it was not reasonable to conclude that the luggage was abandoned. Hence, the Fourth Amendment applied to the drug interdiction search. As previously stated, subject to a few well-delineated exceptions, warrantless searches are *per se* unreasonable. *McMillian v. State*, 325 Md. 272, 281, 600 A.2d 430, 434 (1992); *Ricks v. State*, 322 Md. 183, 188, 586 A.2d 740, 743 (1991). In this case, the State failed to establish that any recognized exception to the warrant requirement applied.

343 Md. at 739-740 (footnote omitted).

The Petitioner's attempt to squeeze this case into the good faith doctrine espoused in *United States v. Leon*, 468 U.S. 897 (1984), fairs no better. As the

Petitioner noted in its petition in this case, the crux of the good faith doctrine is that the police officers acted *reasonably*. As noted above, this case does not present a situation where the officers acted reasonably because they erroneously and unreasonably assumed abandonment from mere silence. It is significant to point out here that Trooper Burnette was well aware of the constitutional requirements of interdiction procedures and with the mandates set forth in *Bostick*. He stated he knew they were required to permit the passengers to leave the bus if they so chose and encouraged them to do so. He further stated that they did not want anyone to think they were coerced into cooperating with them in the interdiction. Thus, on the face of this record, given the Trooper's own testimony, it is clear that the officers acted unreasonably when they assumed Respondent's black bag was abandoned because nobody responded to their question asking whether it belonged to anyone. Despite the apparent conflict in the federal circuit courts regarding whether to apply the good faith exception to warrantless searches, this case does not present a situation to which the good faith exception would apply.

CONCLUSION

This Court's prior decisions are perfectly clear in establishing the standard of reasonable police conduct to be applied in drug interdiction cases. The lower court was not "fundamentally at odds with this Court's Fourth Amendment jurisprudence" in concluding that the police in this case unreasonably assumed abandonment of property from mere silence during a drug interdiction procedure on a Greyhound

bus. Moreover, there is no significant conflict in the decisions of the federal circuit courts or the highest state courts on this issue. It follows that this case is not an appropriate one for certiorari review in this Court.

Respectfully submitted,

Stephen E. Harris
Public Defender

Melissa Moore
Assistant Public Defender
Counsel of Record

Counsel for Respondent